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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Your petitioners are pension plan beneficiaries prevented by wrongful interference in violation of ERISA § 510, 29 U.S.C. § 1140 of the Employee Retirement Income Security Act ("ERISA") from augmenting their respective levels of pension benefit eligibility. The issues presented primarily concern the proper interpretation of this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter referred to jointly as *Mertens/Great-West*). These are the questions presented:

I.

In cases of violation of ERISA § 510 — the provision of ERISA designed to ensure that employers will not interfere in the attainment by employees of ERISA benefits — should the equity enforcement power of ERISA § 502(a)(3) be considered capable of correcting the violation even if doing so has the effect of qualifying the aggrieved employees for present or future monetary benefits?

II.

If the element of monetary relief prevents correction of an ERISA § 510 violation under ERISA § 502(a)(3), can the benefits for which the employees were wrongfully prevented from qualifying be awarded under ERISA § 502(a)(1)(B)?

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OPINIONS BELOW

The decision for which review is sought, entitled *Eichorn v. AT&T Corp.*, is reported at 484 F.3d 644 (3d Cir. 2007) and appears as Appendix A. The denial of petitioners' request for rehearing and rehearing en banc, including the concurring opinion of the Honorable Thomas L. Ambro, Circuit Judge (which is tantamount to a dissent), is reported at 489 F.3d 590 (3d Cir. 2007), and appears as Appendix C.

STATEMENT OF JURISDICTION

The Third Circuit denied a timely petition for rehearing and rehearing en banc on May 31, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil enforcement provision of ERISA, § 502(a), 29 U.S.C. § 1132(a), provides in relevant part that

> a civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter

> or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan.

The substantive rights at issue arise under ERISA § 510, 29 U.S.C. § 1140:

> Interference with protected rights
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for ... the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

STATEMENT OF THE CASE

The facts as stated herein were taken as true for purposes of the lower court motion practice that resulted in summary judgment dismissing the case.

Petitioners are victims of wrongful interference in the attainment of pension benefits in violation of ERISA § 510. They were prevented by the court below, in supposed obedience to the dictates of this Court's previously cited *Mertens* and *Great-West* decisions, from obtaining a court-ordered change in their pension eligibility status under § 502(a)(3). The Circuit Court viewed petitioners' action as one for money damages not traceable to wrongly held property, and as such not a claim for equitable relief within the purview of § 502(a)(3).

At the same time, petitioners were denied relief under § 502(a)(1)(B) because in the absence of an adjustment to

their eligibility status, they had no claim for money currently due them under the terms of the applicable pension plan.

Petitioners are former employees of Paradyne Corp. ("Paradyne"), a one-time subsidiary of respondent AT&T Corp. ("AT&T"). Paradyne manufactured network access products for the telecommunications industry, many of which it supplied to AT&T operations. As Paradyne employees, petitioners were entitled to AT&T pension benefits, which included "bridging rights." If employees left any of the present or former AT&T companies and were employed by another within six months, the employees could "bridge" the terms of employment and continue accruing pension credit for future service as if they had never left.

In July of 1995, AT&T announced its decision to sell Paradyne. AT&T wished to continue to use Paradyne as a supplier to itself and its affiliates (including respondent Lucent Technologies Inc., hereinafter "Lucent"), and wanted Paradyne to retain its skilled workforce.

Shortly thereafter, AT&T announced a business reorganization plan (hereinafter "the trivestiture") that transformed AT&T itself into three independent companies: AT&T, Lucent (sometimes referred to jointly with AT&T as "AT&T/Lucent"), and respondent NCR Corp. As part of the trivestiture process, AT&T transferred ownership of Paradyne to Lucent, which soon carried out the already-announced sale of Paradyne. The buyer was respondent Texas Pacific Group ("TPG"), which was unwilling to buy Paradyne if the purchase entailed continuing Paradyne's pension plan.

In the course of the announced sale of Paradyne, the transfer of Paradyne from AT&T to Lucent and its sale by Lucent to TPG, the respondents entered into various measures and agreements that had the effect of destroying the plaintiffs'

bridging rights. Plaintiffs' pensions were eliminated if they worked for TPG, and plaintiffs were prevented from retaining their pension rights by transferring to another AT&T affiliate as contemplated in the bridging rights. The end result had the practical effect of preventing the Paradyne employees from continuing to accrue pension benefits.

The Third Circuit's 2001 decision reversing the dismissal of plaintiffs' § 510 claim recognized that evidence offered by plaintiffs to support their ERISA claim was sufficient to permit a reasonable finder of fact to determine that loss of the pension benefits was not only the result of the restrictions on hiring, but was the object and purpose of those restrictions. *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert denied*, 534 U.S. 1014 (2001).

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS ISSUES OF PUBLIC IMPORTANCE.

(A) The importance of this case is manifested by widespread commentary and judicial dissatisfaction with narrow interpretations of ERISA's enforcement provisions, particularly as applied to ERISA § 510.

ERISA § 510 was described by the Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), as "a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143. The public importance of the decision for which review is presently sought springs from its practical effect, which is to nullify the provisions in ERISA § 510 prohibiting interference with the attainment of ERISA benefits.

Although the circuits are divided on the point, the court below, as later explained herein, joined with at least one other

circuit in finding that equitable relief under ERISA's enforcement mechanism (§ 502) was too narrow to compel modification of the employer's benefit records where the effect would be to confer monetary benefits.

Public importance is also apparent from the outpouring of scholarly commentary from the judiciary, academia and elsewhere critical of the restrictions imposed by the *Mertens* and *Great-West* decisions on the relief available under § 502(a)(3), and especially critical of emanations from those decisions that have led lower courts in this and other cases to impose even sharper restrictions on statutory protection of employee benefits.

The importance of this case is heightened by the gravity of the subject matter, involving as it does the safeguarding and protection of employee pension plans and welfare benefit plans on which millions depend for health care and old-age subsistence.

To the lengthy bibliography of scholarly writings and judicial opinions collected in the concurring opinion of Circuit Court Judge Thomas L. Ambro in the court below (Appendix C), all of them critical of the rule emerging from the *Mertens*, *Great-West* opinions and the earlier case of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), there must now be added Judge Ambro's own forceful message to this Court, calling on the Court to recognize the unfairness of a result which in his words is "[n]owhere . . . more apparent than in this case." Appendix C at 35a.

Judge Ambro obviously regards the combined impact of this Court's rulings as producing results of questionable soundness. His concurrence is the anguished plea of a jurist prevented by conscience from rationalizing injustice, but

forced to administer it through rote application of rigid and unworkable rules that only this Court can correct.

A similar attitude of resignation and regret was expressed in *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004), where the court declared itself "not unsympathetic to Plaintiffs' situation," *id.* at 1260, but considered itself bound by precedent to deny a remedy for a § 510 violation. The dissent in *Millsap* (by the Honorable Carlos F. Lucero, Circuit Judge) went further by protesting, "Not only does the majority's holding fail to deter ERISA violations," but that holding produces a result under which "the most egregious offenders could be subject to the least sanctions." *Id.* at 1261.

The one case that is arguably supportive of the result reached in *Eichorn*, although it involved peculiar and distinguishing facts, is the unofficially reported Sixth Circuit case of *Alexander v. Bosch Auto Systems*, 2007 U.S. App. LEXIS 11694, 19-20 (6th Cir. 2007). The court in that case ruefully concluded that it was forced to leave the victims of "a conceded statutory violation without a remedy." The court also noted, "Our somewhat discomfiting resolution of this case is similar to that which occurred in *Millsap*. . . . We are likewise not calloused to Plaintiffs' distressing situation."

The paradoxical and unsatisfying results reached in this and other § 510 cases purporting to be based on controlling precedent also invite attention to the broader concerns of the late Edward R. Becker, then Chief Judge of the Third Circuit, with what he described as "an unjust and increasingly tangled ERISA regime." (Concurring opinion in *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003).) Elsewhere in the same opinion Judge Becker referred to "extraordinary subtleties and complexities in this area of the

law that cry out for clarification by the Congress or failing that, by the Supreme Court." *Id.* at 461.

In her concurring opinion in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), Justice Ginsburg called this Court's attention to Judge Becker's views as expressed in *DiFelice*, and explained her own dismay with the pathways followed by lower courts in their interpretation of this Court's rulings. This led Justice Ginsburg to repeat Judge Becker's entreaty, "The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable." 542 U.S. at 223.

(B) The Third Circuit ruling is important because it nullifies key employee protections based on distinguishable interpretations of employees' enforcement rights that did not require harmonizing different sections of the same enactment.

The lower court's near-total evisceration of ERISA § 510 as a tool for preventing interference with the attainment of ERISA-protected benefits is the primary reason for reviewing this case. As ERISA preempts all state remedies, including tortious interference, § 510 provides the only possible remedy for interference with benefit attainment.

Section 510 makes it unlawful to interfere with the attainment of the right to benefits available to plan participants, and concludes by declaring, "The provisions of section 1132 [ERISA § 502] shall be applicable in the enforcement of this section."

Enforcement of ERISA through civil actions was identified by Congress as a prime statutory objective in ERISA § 2(b), 29 U.S.C. § 1001(b), wherein Congress

declared that its intention was to protect "the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

The issue concerning enforcement of § 510 by civil action, therefore, is not whether Congress intended it, but whether meaningful fulfillment of that intention has been obstructed by flaws or imperfections in statutory draftsmanship or by erroneous judicial interpretations.

As articulated by Judge Ambro, the only opportunities for prosecuting interference-type § 510 violations not foreclosed by the lower court's decision involve situations too unlikely of occurrence to provide any serious enforcement potential. Even in those situations, moreover, the relief is essentially theoretical, since as Judge Ambro explained, it can be readily defeated by resort to the tactic of delay. *See* Appendix C at 37a-38a.

Resolution of the division between the courts on this subject (discussed in Section C below) can be accomplished through settled canons of statutory construction that require § 502 and § 510 to be read *in pari materia*, so that proper effect can be given to each. "A statute should be construed so that effect is given to all its provisions . . . and so that one section will not destroy another." 2A Singer, *Sutherland Statutory Construction*, § 46.06 (6th ed. 2000). *See also Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . .") and *Richards v. U.S.*, 369 U.S. 1, 11 (1962) ("A section of a statute should not be read in isolation from context of the whole act . . .").

(C) This case is important because it highlights inter-circuit conflicts over the proper interplay between money damages and equitable relief, particularly as regards equitable power to compel adjustment of employers' benefit records to correct for interference with benefit attainment.

More than any other, this case exemplifies the strained extreme to which the teachings of *Mertens/Great-West* on the supposed incompatibility of equity and monetary relief can be carried. All of the injury for which respondents are responsible is correctable by an equitable decree compelling revision of each plaintiff's benefit eligibility status by crediting each plaintiff with some measure of additional service time to compensate for what was wrongfully denied.

Part II of this petition, dealing with conflicts between the circuits, will more fully describe the decisions by circuit courts that are in conflict with the Third Circuit in this case, notable two Ninth Circuit cases, *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), and *Enniss v. Enniss*, unofficially reported at 198 Fed. Appx. 594 (9th Cir. 2006), as well as two decisions from the Tenth Circuit, *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) and *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004). The conflict lies in the willingness of the courts in these cases to use § 502(a)(3) to command affirmative changes affecting benefit entitlement, without regard to the impact of such changes on monetary benefits.

The unofficially reported case of *Alexander v. Bosch Auto Systems*, *supra*, reluctantly reached the same conclusion as the Third Circuit on the limits of § 502(a)(3) jurisdiction as will be seen in Part II, *infra*.

The equitable decrees approved in *Mathews*, *Millsap* and *Wal-Mart* were issued in reliance on this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and were deemed fully consistent with this Court's more recent *Mertens/Great-West* decisions.

The court below sought to distinguish *Varity* on the ground that the claimants in that case were deserving of equitable adjustment because the corporate subsidiary that employed them, and the different subsidiary of the same company that was ordered to enroll them as participants in its benefit plan, were parts of a common enterprise. Thus in *Varity*, but not in this case, the court below reasoned, an equitable remedy could be justified because it was measurable by the employer's gain and not merely by the employee's loss. Appendix A at 24a-25a.

The important point now in need of resolution is whether such a distinction has any validity where, as here, it was the defendants themselves who barred plaintiffs from remaining in defendants' employ, while at the same time benefiting from plaintiffs' continued services, resulting in material gain to defendants and direct loss to plaintiffs through inability to augment pension benefits. What the lower court ignored, therefore, was the common advantage to TPG, AT&T and Lucent, as either buyers or sellers of Paradyne products, through the reduced costs of producing such products without pension expense.

On the separate issue of what constitutes "money damages" for purpose of enforcement under § 502, the court below added to the restrictions on relief available under § 502(a)(3) as promulgated by this Court, by expanding the concept of money damages as an obstacle to equitable relief. Without discussing the point, the court treated as money

damages everything plaintiffs ultimately hoped to achieve, including monthly pension payments that might or might not become due for future periods. Appendix A at 22a.

Mertens, *Great-West* and *Massachusetts Mutual* were all properly classified as money damage cases because the claimants in each instance, had they been successful, would have obtained money judgments for the full amount of all provable losses. Calling those cases money damage claims on the basis of that characteristic finds validation in Dobbs, *Law of Remedies* § 3.1 (2d Ed. 1993), pp. 277-278:

> The damage remedy is not conditional, and is not payable periodically as loss accrues unless a statute so provides. So the damage award is traditionally made once, in a large sum to compensate for all the relevant injuries, past and future.

Among the petitioners, however, only those currently retired could have qualified for immediate payments, and only in amounts sufficient to adjust for shortfalls in prior pension checks. The primary objective for most if not all of the petitioners, therefore, is vouchsafing the right to enhanced *future* payments which, like all pension payments, would have been contingent on each participant's continued survival. Nothing in *Massachusetts Mutual*, or in *Mertens*/*Great-West*, compels affixation of a fatal "money damages" or "legal remedy" label to a decree that merely conduces toward the periodic future payment of money not yet due, much less, as in this case, money not certain to become due. On the contrary, numerous cases, including this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), leave no doubt that decrees compelling or otherwise affecting entitlement to *future* payments — described in *Bowen* as "prospective" in contradistinction to "retrospective"

payments, *id.* at 890-891 n.14 — are not money damage awards, but represent equitable relief. A fuller account of those cases is reserved for Part II of this petition, as the cases also represent prime examples of circuit court and Supreme Court cases in conflict with *Eichorn*.

To summarize the foregoing, it is difficult to imagine a case that could more dramatically reveal the necessity for eliminating confusion as to the proper boundary between equitable relief claims which qualify for § 502(a)(3) jurisdiction, and money damage claims which do not.

(D) This case also provides an appropriate vehicle for determining whether the intertwining of monetary damages and equitable relief, if not achievable under ERISA § 502(a)(3), can be effected instead under § 502(a)(1)(B).

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990), this Court described its earlier decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), as having "explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510."

This Court has not yet decided whether claims under § 510 can be enforced only under § 502(a)(3), as several lower courts have concluded,[1] or whether it is equally

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1. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1247 (10th Cir. 2004); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir. 1993); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir. 1990); *Russell v. Northrop Grumman Corp.*, 921 F. 142 (E.D.N.Y. 1996).

permissible, as other courts have held, that § 510 claims can also proceed under § 502(a)(1)(B).[2]

Crosby v. Bowater Inc. Retirement Plan, 382 F.3d 587 (6th Cir. 2004), involved a claim for underpayment of lump sum retirement benefits which the plaintiff opted to bring under § 502(a)(3), well knowing that plan language dealing with the methodology for calculating benefits made it pointless to proceed under § 502(a)(1)(B). The court on appeal vacated the district court's award in plaintiff's favor, saying that as an order to pay money, it represented "relief not typically available in equity," and "not available under the statutory provision on which the plaintiff elected to base his claim." *Id.* at 589. The appellate court implied but did not specifically hold that a claim under § 502(a)(1)(B), while perhaps not beneficial under the particular circumstances, would have presented a justicible claim.

The present petitioners have at every stage argued their right to be heard under either or both subsections. Accordingly, there will likely be no better opportunity for the Court to resolve this additional inter-circuit conflict.

Section 502(a)(1)(B) should be seen as especially deserving of this Court's scrutiny because of its distinct potential for alleviating the harsh results courts have felt compelled to reach in previously mentioned cases, often on the largely undebated assumption that subsection 502(a)(3) provides the only remedy for a § 510 violation.

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2. *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988), *appeal after remand*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990); *Babich v. Unisys Corp.*, 1994 U.S. Dist. LEXIS 4744, 1994 WL 167984, at *3 (D. Kan. 1994); *Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1290 (D. Kan. 1993), *aff'd*, 72 F.3d 822 (10th Cir. 1995).

Courts in the comparatively small number of § 510 cases that were in fact allowed to proceed under § 502(a)(1)(B) were faced with the question, not presented here, of whether the plaintiffs, as avowed seekers of legal damages, were entitled to trial by jury. The courts in all such cases concluded that trial by jury was inappropriate because legal relief was only *part* of what § 510 claimants actually needed. As the court in *Adams*, *supra*, put it, the claimants in such cases "have no entitlement to the benefits unless and until a court exercises its equitable powers to decree Plaintiffs eligible beneficiaries of the plan." 149 F.3d at 1161.

Such legal relief as is involved in § 510 cases was accordingly described by *Adams* as "incidental to or intertwined with injunctive relief," 149 F.3d at 1161, using language borrowed from *Tull v. United States*, 481 U.S. 412, 424 (1987), and repeated in *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 571 (1990).

The utility of § 502(a)(1)(B) as a source of both legal and equitable relief is apparent not only from those cases, but from the statute itself. Only the first clause of (a)(1)(B), "to recover benefits due [to the participant or beneficiary] under the terms of his plan," describes a claim analogous to an action at law. As for the second clause, "to enforce his rights under the terms of the plan," it was ironically the Third Circuit itself in *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), that described a suit "that fits within the second clause of section 502(a)(1)(B)" as "patently equitable in nature." *Id.* at 650. The third clause, "to clarify his rights to future benefits under the terms of the plan," can scarcely be seen as authority for anything other than equitable rulings and declarations.

Once it is recognized that § 502(a)(1)(B) provides both legal and equitable relief, the only remaining question is whether anything in the structure or composition of subsection (a)(1)(B), or of ERISA in general, prevents courts from combining the two forms of relief to meet the exigencies of a § 510 violation.

Jurisdiction under subsection (a)(1)(B) is limited to matters affecting plan benefits. Accordingly, the use of this subsection to obtain benefits withheld in violation of § 510 would not logically conflict with prior decisions of this and other courts that have denied recovery to ERISA claimants seeking make-whole relief, meaning consequential damages. Since your petitioners do not seek compensation for lost jobs, emotional distress or other tort-like damages that occupied the primary attention of the courts in cases such as *Mertens/ Great West* and their progeny, including such recent cases as *Millsap*, *supra*, and *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005), these cases present no obstacle to the recovery of benefits *vel non* under § 502(a)(1)(B).

To petitioners' knowledge, the only reason thus far advanced for opposing the use of § 502(a)(1)(B) to obtain benefits withheld in violation of § 510 partakes of the surreal. As the cases cited in Footnote 1 would have it, § 502(a)(1)(B) is unavailable because § 510 claimants are by definition seeking benefits they did not obtain, and thus are not seeking benefits shown as owing on the employers' records. Yet when such claimants seek to invoke § 502(a)(3) to compel revision of such records, they are rebuffed with the explanation that their ultimate goal of money damages disqualifies them for equitable relief.

But if courts totally devoid of equity jurisdiction are incapable of rescuing justice from that Kafkaesque conundrum, such should not be the case with a court empowered to combine legal and equitable relief under § 502(a)(1)(B). In its equity capacity, such a court can instantly engage and overcome the problem through literal application of the familiar maxim, "Equity regards that as done what ought to be done." *Independent Wireless Telegraph Co. v. Radio Corporation of America*, 269 U.S. 459 (1926); *Howe v. Varity Corp.*, 36 F.3d 746, 756-57 (8th Cir. 1994), *aff'd sub nom Varity Corp. v. Howe*, 516 U.S. 489 (1996). Under this concept, an ultimate decision in the employees' favor becomes retroactive recognition of an *ab initio* entitlement to plan benefits or credits.

Benefit recovery actions under § 502(a)(1)(B) have the additional advantage of avoiding entanglement with the concept of "traditional equitable relief" as *Mertens/Great-West* defined it, based on a parsing and analysis of words that appear only in § 502(a)(3). Jurisdiction under § 502(a)(1)(B), therefore, should empower an equity court to award incidental monetary relief, and conversely permit a court functioning as a court of law to provide any needed ancillary or incidental equitable relief.

Granting claimants the right to a remedy under § 502(a)(1)(B) for plan benefits or credits under § 510 would substantially alleviate dissatisfaction within a judiciary that supposes itself bound to use § 502(a)(3) as its only compass, and is now forced against its will to rebuff victims and allow violators to retain their wrongful gains.

II. CONFLICTS BETWEEN THE CIRCUITS, AND BETWEEN THE DECISION OF THE COURT BELOW AND A PRIOR DECISION OF THIS COURT, ARE SUBSTANTIAL AND INVOLVE IMPORTANT FEDERAL QUESTIONS.

(A) Inter-circuit conflicts abound.

There are real and substantial conflicts between the circuit courts as to whether anything in *Mertens/Great-West* prevents the exercise of equitable jurisdiction under § 502(a)(3) in order to redress the type of harm suffered by plaintiffs in this lawsuit. *Eichorn* stands on one side of the divide, reluctantly joined as aforesaid by *Alexander v. Bosch Auto Systems, supra. Alexander*, moreover, was driven by special facts that would have made it difficult to decide the case differently: What the plaintiffs in that case were requesting was not mere amendment of plan records, but a revision of the plan itself.

Among the cases decided subsequent to *Great-West* that solidly support the position advocated by petitioners, and that sharply conflict with the court below, the most prominent is the previously cited Ninth Circuit decision in *Mathews v. Chevron Corp.*, 362 F.3d 1172.

Although not a § 510 case, *Mathews* was similar to the present case in that the plaintiffs were seeking "equitable relief awarded pursuant to ERISA section 502(a)(3) . . . requiring [the employer] to modify its retirement plan records." 362 F.3d at 1176. *Mathews* was based on the employer's slowness in disclosing how it would accomplish a planned downsizing of its workforce, which in its final form offered enhanced pension benefits to the involuntarily terminated employees. The named plaintiffs were eight employees who had voluntarily retired in reliance on prior

announcements that the downsizing would not be accomplished by benefit enhancement. The relief demanded was alteration of the plan records to reclassify the *Mathews* plaintiffs as involuntarily terminated in order to qualify them for the enhanced benefits.

The circuit court in *Mathews* upheld the decision of the district court granting the requested relief, and rejected the employer's contention that under *Great-West*, an injunction requiring modification of its retirement plan records should be classified as legal rather than equitable relief. The *Mathews* employer's theory, although unsuccessful in the Ninth Circuit, is the theory adopted by the Third Circuit in the present case: Relief under § 502(a)(3) was held unavailable because the claimants ultimately sought "compensation for loss resulting from the defendant's breach of legal duty." *Mathews*, 362 F.3d at 1186.

Further explaining its disagreement with what the employer was arguing, the court in *Mathews* observed, "[A]n order to modify plan records" was not "[o]n its face an award of monetary damages," and that by "instating the plaintiffs retroactively" into the plan the order was also "equitable in substance." 362 F.3d at 1186. Tracking the logic of this Court's decision in *Varity Corp. v. Howe*, *supra*, 516 U.S. at 495, the court in *Mathews* added, "If 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." 362 F.3d at 1186.

The decision of the Tenth Circuit in *Millsap*, *supra*, is also a post-*Great-West* case in conflict with the decision below. *Millsap* arose, like the present case, under § 510.

Millsap came before the circuit court with major issues already resolved. No appeal had been taken from the district

court's finding that the defendant employer violated § 510 by closing a particular plant and terminating everyone employed there, all for the purpose and with the intent of avoiding future pension and health coverage costs. By stipulation, the parties had also agreed on the amount payable to the class members for the value of their lost pension and health care benefits. All that remained was for the appellate court to determine whether in the light of *Great-West*, "appropriate equitable relief" under § 502(a)(3) could be made to include, as part of the relief available for a § 510 violation, compensation in the form of back pay for loss of employment itself, as distinct from the loss of ERISA-governed benefits. 368 F.3d at 1248.

Millsap decided that issue in favor of the employer. It did so, however, for reasons placing the Tenth Circuit squarely in conflict with the decision below.

Millsap concluded that because § 510's "purpose is to protect the participants *in employee benefit plans*" (*Id.* at 1259 — emphasis by the court), claims for lost wages do not stand on the same protected footing as claims for lost benefits. As your petitioners lost only pension benefits and not jobs, the relief the Third Circuit denied petitioners would have been granted in the Tenth Circuit on the authority of *Millsap*.

Still another § 502(a)(3) case from the Tenth Circuit, *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, *supra*, involves dissimilar facts, but nevertheless conflicts with the Third Circuit's interpretation of *Great-West* as requiring denial of equitable relief merely because doing so would advance an ultimate goal of recovering money benefits. The court in *Wal-Mart* observed, "After all, any equitable relief, including those forms explicated by the [Supreme] Court as available under

§ 502(a)(3), must involve the direct or indirect transfer of money, and we cannot read the statute to proscribe all forms of relief." *Id.* at 1125.

Other cases, although decided prior to *Mertens/Great West*, conflict in principle with the present case to the extent that they illustrate cogent theories for achieving justice in cases of the sort here presented, and do so without conflicting in any way with *Mertens/Great West*. One such case, *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), concerned the plaintiffs' eligibility under the terms of a severance plan. The plaintiffs, who had opted to proceed as claimants for money damages under § 502(a)(1)(B), insisted they were entitled to trial by jury. The court disagreed, citing *Tull v. United States*, 481 U.S. 412, 424 (1987), for the proposition that "[a]n award of money damages may be considered an equitable rather than legal remedy" if the award is "incidental to or intertwined with injunctive relief." *Id.* at 1161. To emphasize that the claim for money damages was only part of the case, the court in *Adams* added:

> What Plaintiffs overlook, however, is the fact they have no entitlement to the benefits unless and until a court exercises its equitable powers to declare Plaintiffs eligible beneficiaries of the plan and thus order Defendants, as fiduciaries, to pay benefits.

Id.

Your petitioners have consistently argued that their remedies should not be limited to § 502(a)(3) but, as in *Adams* and the Third Circuit's own earlier decision in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988), *appeal after remand*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), should in the alternative include the right to

combine legal and equitable relief within the confines of § 502(a)(1)(B).

It does not appear that this Court has previously addressed the separate issue of whether § 502(a)(3) is the exclusive remedy for violations of § 510, or if such violations can also be remedied under § 502(a)(1)(B). The existing conflict between circuit courts on this issue was detailed by the court below. (Appendix A at 15a-17a.)

This Court should resolve these inter-circuit conflicts and clarify the contours of ERISA remedies for § 510 violations.

(B) The decision below conflicts with this Court's *Varity* and *Bowen* decisions, and with circuit court decisions which, like *Bowen*, regard orders compelling future payments as equitable relief.

The Third Circuit's 2007 *Eichorn* decision is not reconcilable with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). This Court in *Varity* considered it a proper exercise of equitable jurisdiction under § 502(a)(3) to reinstate the plaintiffs as participants in a medical benefit plan to compensate for injury resulting from the employer's fraud in inducing them to switch jobs.

The Ninth Circuit in *Mathews*, *supra*, saw *Varity* as authority for identical relief under virtually identical circumstances. The factually inapposite grounds on which the court below attempted to distinguish *Varity* have been noted in Part I, Section C of this petition.

The decision in this case is also in conflict with a comparatively minor aspect of this Court's decision in *Bowen v. Massachusetts*, *supra*. *Bowen* involved a federal court action brought by the Commonwealth of Massachusetts to

set aside an administrative order which disallowed the Commonwealth's claim for reimbursement of health care expenditures under a federally-assisted Medicaid program. The primary issue before this Court was whether the claim for past-due reimbursement was an action for money damages, and as such barred by sovereign immunity, owing to the lack of any statutory waiver of such immunity for claims of that description.

The majority and dissenting opinions in *Bowen* differed on whether past-due reimbursement could avoid the "money damages" classification. However, unanimity of opinion regarding the equitable character of an order affecting entitlement to future payments, even if equivalent to an award for the future payment of the money itself, was made clear in Justice Scalia's dissent:

> I agree with the Court that sovereign immunity does not bar respondent's actions insofar as they seek injunctive or declaratory relief with prospective effect. An action seeking an order that will prevent the wrongful disallowance of future claims is an action seeking specific relief and not damages, since no damage has yet occurred.

487 U.S. at 921-922.

The Third Circuit's unwillingness to recognize that orders affecting future payments are not money damage claims also puts it in conflict with the Tenth Circuit in *Callery*, *supra*, 392 F.3d at 407. *Callery* denied that the case before it could qualify for equitable relief under ERISA § 502(a)(3), but held that court-ordered changes "to affect the beneficiary's ability to receive future payments" was "a clear equitable remedy and is distinct from the relief sought in this case," 392 F.3d at 407, citing *Downie v. Independent*

drivers Ass'n Pension Plan, 934 F.2d 1168, 1170-1171 (10th Cir. 1991).

To forestall criticism that it was transgressing prohibitions on the use of ERISA § 502(a)(3) to award money damages, the Ninth Circuit in the previously cited *Enniss* case denied that it was compelling performance of "a *past due* monetary obligation," (quoting from *Great-West* — emphasis supplied by the court), but was instead ordering the employer "to fulfill a future obligation." 198 Fed. Appx. at 596.

Measured against these precedents, the outcome of this case suggests more than mere failure to apply the correct rule of law on claims for future ERISA benefits. It suggests that in the aftermath of *Mertens/Great-West*, there is a rising tide of negativity toward ERISA claimants generally that this Court, based on the *Eichorn* experience, can confront and correct.

III. THE ISSUES PRESENTED CAN APPROPRIATELY BE REVIEWED IN CONJUNCTION WITH THE CASE OF *LaRUE v. DEWOLFF, BOBERG & ASSOCIATES, INC.*, 127 S.Ct. 2971 (2007), WHICH IS ALREADY BEFORE THE COURT.

This Court has granted certiorari in the case of *LaRue v. DeWolff, Boberg & Associates, Inc.*, 127 S.Ct. 2971 (2007). *LaRue* was decided by the circuit court under ERISA § 502(a)(2), and is reported at 458 F.3d 359 (4th Cir. 2006). Although that subsection of § 502(a) is not involved here, the *LaRue* case nevertheless will likely entail study and reassessment of some or all of the same Supreme Court decisions that have affected the result here.

Consideration of this case in tandem with *LaRue* would permit this Court to undertake a comprehensive critique of the law concerning ERISA § 502(a) as it has thus far unfolded, and provide a broader and more informed basis for construing the scope of available ERISA remedies.

IV. THE VIEWS OF THE UNITED STATES SOLICITOR GENERAL SHOULD BE CONSULTED.

The concerns of the Secretary of Labor about restraints on the employment of ERISA generally are well known to this Court through amicus briefs submitted in various cases by the Solicitor General, including the pending *LaRue* case. From the Secretary's manifest dissatisfaction with what has come to be seen as a cramped interpretation of ERISA § 502(a)(3) in particular, there is excellent reason to suppose that the Solicitor General would enthusiastically respond if invited to comment in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and consideration should be given to consolidating this case with *LaRue*.

Respectfully submitted,

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Dated: August 29, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No.: 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on Behalf of all Others Similarly Situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS,

Appellants

v.

AT&T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10.

Appendix A

Submitted Under Third Circuit
LAR 34.1(a) March 27, 2007

(Filed May 2, 2007)

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587
District Judge: Honorable Stanley R. Chesler

Submitted Under Third Circuit LAR 34.1(a)
March 27, 2007

Before: FISHER, JORDAN and ROTH, *Circuit Judges.*

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

This case is before us for the second time on appeal. In the previous appeal, *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert. denied*, 534 U.S. 1014, 122 S.Ct. 506, 151 L.Ed.2d 415 (2001), we held that the plaintiffs had presented sufficient evidence of the defendants' specific intent to interfere with their pension rights to survive summary judgment on their claims under § 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. *Id.* at 150. We reversed the District Court's order granting summary judgment to the defendants and remanded for further proceedings. *Id.* After nearly three years of additional proceedings on remand, the District Court again granted summary judgment to the defendants, holding that the relief

the plaintiffs sought was not available to them. The plaintiffs appeal from that order and challenge several of the District Court's interlocutory orders. We will affirm.

I

We have previously set forth the basic facts in this litigation, *Eichorn*, 248 F.3d at 136-37, and we recite only the facts relevant to the present decision.

A

The plaintiffs are former employees of Paradyne Corporation ("Paradyne"). In 1995, Paradyne was part of AT&T Corp. ("AT&T"). AT&T reorganized that year, splitting into three parts: AT&T, Lucent Technologies, Inc. ("Lucent"), and NCR Corporation. In the course of the reorganization, AT&T transferred Paradyne to Lucent. In 1996, Lucent sold Paradyne to a business called Texas Pacific Group ("Texas Pacific"). Before that sale, the plaintiffs in this case had pension plans that included certain "bridging rights." If an employee left Lucent or another of the former AT&T companies and returned within six months, either to the company the employee had left or to another of the former AT&T companies, the employee could "bridge" the two terms of employment, receive pension credit for all prior service, and continue to accrue pension benefits as if he had never left. If the employee left and did not return until after the six-month "bridging period" had expired, the employee would need to work for an additional five years to regain his previous level of pension benefits.

Appendix A

The alleged basis for the plaintiffs' ERISA claims is that the defendants entered into agreements as part of the sale of Paradyne that had the effect of canceling the plaintiffs' bridging rights. In 1995, when Paradyne was part of AT&T, AT&T announced its intent to sell Paradyne. Recognizing the value of Paradyne's work force, and wanting to make Paradyne more attractive to potential buyers, AT&T announced a policy precluding any employee who voluntarily left Paradyne from being hired by any other division of AT&T. On June 18, 1996, Lucent and Texas Pacific signed a purchase agreement for the sale of Paradyne, and on July 31, 1996, the sale closed. The June 18 purchase agreement included a provision-referred to in this litigation as the "Pre Closing Net"—whereby Lucent promised that neither it nor any of the other former AT&T companies would hire any Paradyne employees who left Paradyne voluntarily before the sale closed and whose annual salaries were more than $50,000. On the date of the closing, Lucent signed an "employee matters agreement," which included a paragraph-referred to in this litigation as the "Post Closing Net"—extending the provisions of the Pre Closing Net for 245 days (eight months) after the closing.

Once the sale closed, the Paradyne employees' employment with Lucent terminated, and the "bridging period" began. Because the no-hire agreement embodied in the Pre Closing Net and Post Closing Net lasted for eight months, the Paradyne employees who made more than

$50,000 annually were prevented from exercising their bridging rights.[1]

B

Near the time of the Paradyne sale, Kurt Eichorn and Gilbert Daley filed substantially identical class action complaints in the United States District Court for the District of New Jersey, naming AT&T, Lucent, and Texas Pacific as defendants, and asserting, inter alia, that the Pre Closing Net and Post Closing Net violated § 510 of ERISA. The actions were consolidated and, after discovery, the District Court granted the defendants' motion for summary judgment, holding that the plaintiffs had not put forth sufficient evidence to create a triable issue of fact as to whether the defendants had the required intent to interfere with the plaintiffs' bridging rights. *Eichorn v. AT&T Corp.*, No. 96-3587, 1999 WL 33471890, at **2-6 (D.N.J. Aug. 23, 1999). On appeal, this court reversed and remanded that holding because we determined that the plaintiffs had presented sufficient circumstantial evidence to create a genuine issue of material fact regarding the defendants' intent. *Eichorn*, 248 F.3d at 149-50. The panel also directed the District Court on remand to address the plaintiffs' motions for additional discovery and for class certification. *Id.* at 150.

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1. Of the 29 plaintiffs in this case, 3 eventually returned to Lucent, and all 3 remained there long enough to bridge their pension rights, though they note they were "damaged by loss of pension-created service during the time corresponding to their period of separation."

Appendix A

C

On remand, the District Court reopened discovery and allowed the plaintiffs to file a motion for class certification. The parties appear to have proceeded after remand on the assumption that the plaintiffs would be entitled to some form of compensatory damages if they succeeded in proving their ERISA claims. On May 27, 2003, over three months after the close of reopened discovery and some seven years from the start of the case, the plaintiffs submitted spreadsheets to the District Court, offering their damage calculations for the first time. The spreadsheets were prepared by plaintiffs' counsel's son, Stephen Crowley, who was not offered as an expert and has no training or experience with the economics of employment benefits.

Mr. Crowley's calculations purported to quantify what each plaintiff would have earned in pension benefits, had he or she remained employed at an AT&T company after the sale of Paradyne. In performing the calculations, Mr. Crowley made various assumptions about such future events as when the plaintiffs would have retired, how their salaries would have increased had Paradyne remained part of Lucent, what choices the plaintiffs would have made with respect to their pension benefits, and what each plaintiff's life expectancy was. With his calculations, Mr. Crowley submitted a life expectancy chart from the "Foundation for Infinite Survival" and various statistical tables from the United States Department of Labor which, he asserted, provided part of the basis for his calculations.

Appendix A

The District Court accepted the plaintiffs' belated submissions and reopened discovery again to allow the defendants to depose Mr. Crowley. After deposing Mr. Crowley, the defendants made a motion to strike his calculations and to preclude him from testifying at trial. The plaintiffs opposed the motion and argued that, if the District Court were to grant the defendants' motion, the plaintiffs should be allowed to engage a damages expert. On November 10, 2004, the District Court granted the defendants' motion and denied as untimely the plaintiffs' request for leave to engage an expert.

In the course of making his initial ruling from the bench, which was later reduced to a written order, the District Judge explained that he did not believe his order would effectively end the case for the plaintiffs, because the plaintiffs might still be entitled to seek back pay and would not need the assistance of an expert to establish their entitlement to that relief. The Judge said,

> at a minimum, it would appear that a back pay case can in some manner or other go to the jury. Indeed, in this type of ERISA claim, a back pay claim is normally one of the court claims which go. In short, the theory of the case is that the plaintiffs were precluded from employment because of and based upon a desire to deny them . . . rights which they have under ERISA. . . .
>
> And therefore, in the Court's view, what could and would go to the jury would indeed be claims predicated upon the denial of their employment and potential back pay claims.

Further, the District Judge noted that the plaintiffs sought injunctive relief, and the Judge agreed that there was "at least a possibility" that such relief was available. Even so, he did not definitively rule on the issue, and the written order stated that "the Court does not reach the issue whether plaintiffs can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiff[s'] pension benefits and reserves such issue for resolution at or before trial." After he granted the defendants'*649 motion to strike Mr. Crowley's testimony and evidence, the District Court ordered the parties to confer with a magistrate judge "to schedule limited discovery of remaining damages issues and preparation of a final pretrial order."

After the reopened discovery closed, the defendants moved for summary judgment. They argued that the only relief available to the plaintiffs on their claim under ERISA § 510 for unlawful interference with benefits is the "appropriate equitable relief" available through § 502(a)(3) of the statute. Summary judgment was appropriate, they argued, because the only relief that the plaintiffs had requested or could request-given the District Court's order striking Stephen Crowley's submissions and denying the plaintiffs leave to find an expert to replace him-was "back pay," which is not "equitable relief" under § 502(a)(3). The District Court agreed with that analysis and, accordingly, granted summary judgment to the defendants. The plaintiffs now appeal, challenging the summary judgment order, the order that struck Stephen Crowley's submissions and denied

leave to retain an expert, and certain other interlocutory orders.[2]

II

The plaintiffs argue that the District Court erred both in ruling that Mr. Crowley's proposed evidence was inadmissible and in denying them leave to present an expert in lieu of Mr. Crowley. More specifically, though the plaintiffs concede that Mr. Crowley was not qualified as an expert, they argue that no special qualifications were necessary to testify regarding future damages in this case and that Mr. Crowley's testimony and spreadsheets were admissible under Federal Rule of Evidence 1006 as summaries of the contents of the statistical tables he submitted. The plaintiffs also argue that the District Court's order denying them leave to retain an expert witness after Mr. Crowley was excluded was an abuse of discretion. Those arguments are without merit.

---

2. The plaintiffs challenge the District Court's order of October 23, 2003, denying the plaintiffs' motion for class certification, and its orders of April 16, 2003, and July 19, 2005, denying the plaintiffs' motions to compel discovery of certain matters. We have considered the arguments of the parties with respect to the District Court's order of April 16, 2003. We are satisfied that the District Court correctly interpreted the mandate of this court with respect to the scope of the § 510 claims as to which the plaintiffs had presented enough evidence to survive a motion for summary judgment, and that the District Court did not otherwise abuse its discretion in denying the plaintiffs' motion to compel. The plaintiffs' challenges to the District Court's orders of October 23, 2003, and July 19, 2005, are moot in light of our disposition of this case.

Appendix A

A

In excluding Mr. Crowley's evidence, the District Court was within the broad discretion afforded it under Federal Rules of Evidence 701 and 702 to act as a gatekeeper charged with preventing unreliable opinion testimony. Although this court has recognized that lay opinion as to technical matters may sometimes be appropriate, *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1200-01 (3d Cir.1995), we have cautioned that "Rule 701 requires that a lay opinion witness have a reasonable basis grounded either in *experience or specialized knowledge* for arriving at the opinion that he or she expresses.... In order to satisfy these disposition of this case. Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered. *Id.* at 1201 (original emphasis). Whether a witness is "qualified" to offer opinion testimony is committed to the discretion of the trial court, and we have no difficulty holding that the District Court was within its discretion in saying that Mr. Crowley was not qualified to offer a damages opinion here. As the plaintiffs concede, Mr. Crowley had no personal knowledge of the underlying facts and no relevant experience or training.[3]

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3. The plaintiffs correctly note that expert testimony is not always required to prove damages in cases where projected future earnings are part of the calculation. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175-76 (3d Cir.1993); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 797 (3d Cir.1985). Here, however, the calculations were sufficiently complex that the District Court was

(Cont'd)

We also reject the plaintiffs' argument that Mr. Crowley's submissions were admissible under Rule 1006. That Rule provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Courts have cautioned that Rule 1006 is "not a back-door vehicle for the introduction of evidence which is otherwise inadmissible," and that the voluminous evidence that is the subject of the summary must be independently admissible. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir.2004); *see also United States v. Pelullo*, 964 F.2d 193, 204-05 (3d Cir.1992). The plaintiffs' proffered calculations are better described as a synthesis rather than a summary of the charts and other evidence on which Mr. Crowley relied. The calculations went beyond the data they summarized and included several assumptions, inferences, and projections about future events, which represent Mr. Crowley's opinion, rather than the underlying information. The proposed evidence is thus subject to the rules governing opinion testimony and was properly held inadmissible. *See* Fed.R.Evid. 701, 702; *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 258 (6th Cir.1986) (proposed exhibit was improperly

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(Cont'd)
within its discretion to hold that someone more qualified than plaintiffs' counsel's son was needed to testify. *Cf. LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928-29 (10th Cir.2004) ("Given Mr. Livingston's utter lack of any familiarity, knowledge, or experience with damages analysis, the district court did not abuse its discretion in ruling that he could not testify as an expert regarding such a complex subject matter as LifeWise's fourth damages model.").

admitted because, despite being labeled "Summary of Actual Damages," it "projected future events and economic losses, and was therefore not a simple compilation of voluminous records."); *State Office Sys., Inc. v. Olivetti Corp.*, 762 F.2d 843, 845-46 (10th Cir.1985) (projections of future lost profits set forth in a summary "are not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events, not a simple compilation of voluminous records.").

B

In denying the plaintiffs leave to engage an expert to replace Mr. Crowley, the District Court was within its power under Rule 16(b) of the Federal Rules of Civil Procedure to make and enforce scheduling orders. Rule 16 gives the district courts wide latitude to manage discovery and other pretrial matters, and to set deadlines for amending pleadings, filing motions, and completing discovery. Subsection (b) provides that scheduling orders "shall not be modified except upon a showing of good cause and by leave of the district judge." This Court and others have frequently upheld a trial court's exercise of discretion to deny a party's motion to add experts or other fact witnesses after the close of discovery or after a deadline in a scheduling order. *E.g., Burks v. Okla. Publ'g Co.*, 81 F.3d 975, 978-80 (10th Cir.1996); *Geiserman v. MacDonald*, 893 F.2d 787, 790-91 (5th Cir.1990); *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir.1986).

In this case, the reopened discovery on remand closed in January of 2003. As the defendants note, the plaintiffs were obligated under Federal Rule of Civil Procedure

26(a)(1)(C) to disclose early in the case, at or within 14 days after the discovery planning conference required by Rule 26(f), "a computation of any category of damages claimed" and "the documents or other evidentiary material, not privileged or protected from disclosure, on which such [damage] computation is based. . . ." The plaintiffs did not submit that information until May 2003, several months after the reopened discovery had closed, and nearly seven years into this litigation. Although the District Court pressed plaintiffs' counsel about plaintiffs' plan to proceed without expert testimony on the issue of damages, and although the Court told plaintiffs' counsel that "defendants have to know what claims a plaintiff is going to pursue in terms of damages in order to be able to prepare for it," the plaintiffs insisted that no expert testimony was necessary. The District Court then reopened discovery again to allow the defendants to depose Mr. Crowley. The plaintiffs did not request leave to present a damages expert until after the defendants filed their motion to exclude Mr. Crowley. The District Court considered the plaintiffs' explanation for the lateness of their request, the prejudice that would result if it were granted or denied, and the extent to which the plaintiffs' decision to proceed without expert testimony was a deliberate one. Under the circumstances, the District Court was well within its discretion to deny the plaintiffs' motion.

III

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful for an employer to act against an employee "for the purpose of interfering with the attainment of any right to which such participant might become entitled" under a

benefit plan. Section 510 concludes with the statement that "[t]he provisions of section 1132 [i.e., ERISA § 502] of this title shall be applicable in the enforcement of this section." The Supreme Court has held that the remedies available for a violation of § 510 are thus limited to those set forth in § 502(a) of ERISA, 29 U.S.C. § 1132. *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 144, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *see also Cox v. Keystone Carbon Co.,* 861 F.2d 390, 392 (3d Cir.1988) (explicitly rejecting the argument that "once Congress created a right pursuant to § 510, Congress was without power to restrict the remedies available . . . [and] it is entirely up to the court to fashion appropriate remedies. . . .").

Though the parties dispute the scope and application of subsections (a)(1)(B) and (a)(3), they do not suggest that any other portions of ERISA § 502 apply to this case.

A

The District Court held that the plaintiffs could not seek relief under ERISA § 502(a)(1)(B) because that section only provides relief for violations of the terms of a benefit plan, and the plaintiffs have not alleged such a violation. We agree.

Appendix A

1

Subsection (a)(1)(B) provides that "[a] civil action may be brought by a participant or beneficiary . . . to recover benefits due to him *under the terms of his plan,* to enforce his rights *under the terms of the plan,* or to clarify his rights to future benefits *under the terms of the plan.*" 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The subsection thus provides a cause of action only where a plaintiff alleges a violation of the terms of a benefits plan or an ambiguity in the plan requiring judicial interpretation. In holding that subsection (a)(1)(B) is not an appropriate vehicle for enforcing a claim of interference with the benefits of a plan, which is the gravamen of the claim here, the Seventh Circuit explained:

> [T]o enforce the terms of a plan under Section 502, the participant must first qualify for the benefits provided in that plan. Rather than concerning itself with these qualifications, one of the actions which Section 510 makes unlawful is the interference with a participant's ability to meet these qualifications in the first instance.

Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir.1992) (citation omitted). This appears to be the view of the few courts that have squarely confronted the issue. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir.1999) (citing *Tolle*); *Russell v. Northrop Grumman Corp.*, 921 F.Supp. 143, 150 (E.D.N.Y.1996) (citing *Tolle*). Other courts have implicitly taken this view by indicating in dicta that § 502(a)(3) is the provision available for enforcing a §

510 interference claim. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1247 (10th Cir.2004) ("Section 502(a)(3) of ERISA provides the plan participant with his exclusive remedies for a § 510 violation."); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir.1993) (quoting § 502(a)(3) as the enforcement mechanism for rights under § 510); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir.1993) (Section 510, "enforced through § 1132(a)(3) [i.e., § 502(a)(3)], provides a companion to § 1132(a)(1), which provides actions to recover benefits or clarify rights."); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir.1990) ("If discharging [the plaintiff] was 'unlawful' under § 1140 [i.e., § 510], plaintiff was entitled to bring (and did bring) an action for declaratory and injunctive relief under 29 U.S.C. § 1132, which authorizes [the relief set forth in ERISA § 502(a)(3)]."); [4] *cf.* Dana M. Muir, *ERISA Remedies:*

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4. In *Held*, the plaintiff alleged that the defendants violated ERISA § 510 by coercing him to resign shortly before he had completed the ten years of service necessary for certain of his pension rights to vest. 912 F.2d at 1198. Although the majority in *Held* stated that the plaintiff had "two distinct causes of action," one of which was a claim under § 502(a)(1)(B) for "benefits due under the plan," *id.* at 1203-04, it is clear from both the majority's and the dissenting judge's discussion that the cause of action under § 502(a)(1)(B) was not to enforce rights under § 510, but was instead based on the plaintiff's allegation that he had actually accrued some pension rights that the defendants had failed to honor. *See id.* at 1203 n. 7 (reading the complaint as potentially raising a "colorable claim to something less than '100% of accrued benefits' based on his employment of more than nine years"); *id.* at 1203-04 ("Admittedly, the parties' briefs emphasize Mr. Held's § 510 claim and give short shrift to the issue of Mr. Held's *separate claim* for benefits due under the plan.")

(Cont'd)

Chimera or Congressional Compromise?, 81 Iowa L.Rev. 1, 39 & nn. 321-22 (1995) ("Many commentators and courts agree that Section 502(a)(3) . . . provides the sole basis for suits alleging a violation of Section 510."). Decisions from at least one court appear to take the opposite view. *See Zimmerman v. Sloss Equip., Inc.*, 835 F.Supp. 1283, 1290 (D.Kan.1993) ("The remedies for a violation of ERISA § 510 are those set forth in ERISA § 502(a)(1)(B) and (a)(3)."); *Babich v. Unisys Corp.*, No. 92-1473, 1994 WL 167984, at *3 (D.Kan.1994) ("the damages available to an ERISA § 510 plaintiff are found in ERISA's enforcement provision, § 502(a)(1)(B) and (a)(3)."") (citing *Zimmerman* and *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 392-94 (3d Cir.1988)).[5]

We agree with the Seventh Circuit's reasoning in *Tolle*, which follows from a straightforward reading of the statute. Subsection (a)(1)(B) provides remedies only against a defendant who has failed to comply with the terms of a benefits plan. It allows plaintiffs to collect benefits "due

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(emphasis added); *id.* at 1207 (Ebel, J., dissenting) (disagreeing with "the majority's view that the plaintiff has filed a separate claim for benefits due him under the terms of the retirement plan" because, as he read the record, "it is clear that plaintiff's request for benefits is linked only to his discriminatory termination claim under section 510 of ERISA.").

5. As we will explain, *infra* § III.A.2, our decision in *Cox v. Keystone Carbon*, 861 F.2d 390 (3d Cir.1988) does not hold that § 502(a)(1)(B) provides relief for a claim under § 510 for interference with benefits.

under the terms of the plan" or to enforce "rights under the terms of the plan." Here, the plaintiffs have alleged that the defendants interfered with their ability to become eligible for further benefits, not that the defendants have breached the terms of the plan itself. We therefore agree with the District Court that subsection (a)(1)(B) does not provide relief for the violation of ERISA that the plaintiffs have alleged, and, accordingly, summary judgment on the issue was proper.

2

The plaintiffs argue that this Court's decisions in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir.1988) ("*Cox I*") and *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir.1990) (" *Cox II* "), and the Tenth Circuit's decision in *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir.1998), support a different result. In this they are mistaken.

The plaintiffs' principal argument appears to be that, although they have not alleged that the defendants violated the terms of the benefits plan, the District Court could nevertheless effectively create a violation of the plan through a decree ordering Lucent to adjust its pension records to treat the plaintiffs as if they had remained at Lucent until retirement. The plaintiffs contend that such an order would result in an immediate obligation on the part of the defendants to pay the plaintiffs money that was rendered "past due" by operation of the court's decree, thus entitling the plaintiffs to seek relief under subsection (a)(1)(B). This bootstrap approach finds no support in the decisions the plaintiffs cite.

The Tenth Circuit's opinion in *Adams* is inapposite, as the plaintiffs in that case alleged violations of the terms of a plan rather than interference with the attainment of benefits. The court in *Adams* was not asked to construct a violation of an order and then treat that violation as if it were a violation of the terms of a benefit plan. The court was simply asked to construe the terms of the plan itself to determine whether the plaintiffs were eligible for the benefits they sought. 149 F.3d at 1158-62. Unlike the plaintiffs in this case, the plaintiffs in *Adams* alleged a violation of the terms of their former employer's plan and were thus clearly entitled to seek relief under ERISA § 502(a)(1)(B). Here, by contrast, the plaintiffs have alleged that the defendants interfered with their ability to become eligible for benefits, which, as the Seventh Circuit explained in *Tolle*, is not a proper basis for relief under § 502(a)(1)(B).

Although *Cox I* and *Cox II* involved claims under ERISA § 510, they are also unavailing as support for the plaintiffs' argument. In *Cox I*, this Court indicated in dictum that § 510 could be enforced through § 502(a)(1)(B) when an interference-with-benefits claim is alleged. 861 F.2d at 392-93. However, that appears to have been a proposition assumed by the parties and accepted by us without analysis or discussion. Moreover, we expressly declined to decide whether § 502(a)(1)(B) provided any relief to the plaintiff in that case. *Id.* at 394. Instead, we remanded for the district court to determine in the first instance "if Cox is entitled to relief pursuant to § 502(a)(1)(B), and if so, whether or not Cox is entitled to a jury trial on this claim." *Id.*

On remand, the district court held that Cox had stated a § 510 claim enforceable under § 502(a)(1)(B), but that he was not entitled to a jury trial and that he lost on the merits of that claim. Cox appealed, and we affirmed in *Cox II.* As in *Cox I,* the primary focus of our discussion was whether Cox was entitled to a jury trial. 894 F.2d at 649-50. We did not undertake any analysis of whether the district court had correctly held that a claim under § 510 could be enforced under § 502(a)(1)(B). The only comment we made that appears directly relevant to this issue undermines, rather than supports the plaintiffs' position in this case. In disposing of Cox's arguments, we stated, "[t]o the extent that Cox seeks compensatory damages for tortious interference, that claim does not fall within section 502(a)(1)(B)." 894 F.2d at 650. Our decisions in *Cox I* and *Cox II* thus do not conflict with the Seventh Circuit's reasoning in *Tolle,* nor do they prevent us from adopting that reasoning in this case, as the District Court did. Because we find that reasoning persuasive, we hold that a § 510 claim for interference with benefits is not enforceable under § 502(a)(1)(B).

B

The District Court held that the plaintiffs were not entitled to "appropriate equitable relief" under ERISA § 502(a)(3) because they had waived their right to request equitable restitution or injunctive relief. Alternatively, the District Court ruled that, even if the plaintiffs had not waived any of their rights with respect to a remedy, the relief they requested was not "appropriate equitable relief" within the meaning of the statute. We agree on the latter point and, therefore, do not reach the question of waiver.

Appendix A

1

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought—
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> (B) to obtain *other appropriate equitable relief*
>
> (i) to redress such violations or
>
> (ii) to enforce any provisions of this subchapter or the terms of the plan;

(emphasis added). The Supreme Court has held that the phrase "appropriate equitable relief" means only "those categories of relief that were *typically* available in equity" in the days of the divided bench, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (original emphasis)). According to the Supreme Court, such relief includes "injunction, mandamus, and restitution, but not compensatory damages." *Mertens*, 508 U.S. at 256, 113

S.Ct. 2063. Thus, a plaintiff seeking relief under ERISA § 502(a)(3) must tie that request to a form of relief typically available in equity. In *Great-West,* the Court suggested that "the basic contours of the term [equitable relief] are well known," and can be understood by consulting "standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." 534 U.S. at 217, 122 S.Ct. 708; *see also Sereboff v. Mid Atl. Med. Servs., Inc.*, __ U.S. __, 126 S.Ct. 1869, 1875-76, 164 L.Ed.2d 612 (2006) (referring to Dobbs, Palmer, and *Pomeroy's Equity Jurisprudence* to explain the contours of the right to an equitable lien).

As earlier noted, the plaintiffs sought a decree from the District Court requiring Lucent to adjust its pension records retroactively to create an obligation to pay the plaintiffs more money, both in the past and going forward. The District Court rightly saw this as being, in essence, a request for compensatory damages merely framed as an "equitable" injunction. The Court thus rightly concluded that the requested relief is not available under § 502(a)(3).[6]

6. This is not to say that an ERISA plaintiff's demand for money necessarily requires the conclusion that the relief sought is not "equitable" within the meaning of the statute. The Supreme Court has explained that some forms of equitable relief-such as constructive trusts, equitable liens, or accounting for the profits derived from wrongly held property-include the payment of money. *Great-West,* 534 U.S. at 213-14 & n. 2, 122 S.Ct. 708. As the Court explained in *Great-West,* however, these forms of relief are available in limited circumstances. "Almost invariably, suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as

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Great-West, 534 U.S. at 210, 122 S.Ct. 708; *Mertens*, 508 U.S. at 255, 113 S.Ct. 2063 (1993); *see also Bowen v. Massachusetts*, 487 U.S. 879, 915-16, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (Scalia, J., dissenting) ("It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.").

2

The plaintiffs argue that the relief they seek is indistinguishable from the relief approved by the Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), and, therefore, *Varity* and this Court's decisions in *Cox I* and *Cox II*, as well as the Tenth Circuit's decision in *Adams*, compel a different result. Once again, we disagree.

In *Varity*, the defendant corporation deceived several of its employees into transferring their jobs and their benefit plans from a profitable subsidiary to another subsidiary that had been set up to fail. *Id.* at 493-94, 116 S.Ct. 1065. The trial court found that the defendant had violated its obligation as a fiduciary to operate its benefits plan "solely in the interest

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that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Id.* at 210, 122 S.Ct. 708 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (Scalia, J., dissenting)).

of the participants and beneficiaries" of the plan, and issued an order—citing ERISA § 502(a)(3) as its source of authority-directing the corporation to reinstate the transferred employees back into the benefits plan of the profitable subsidiary. *Id.* at 494-95, 116 S.Ct. 1065. *Varity* is distinguishable from the present case for at least two reasons.

First, the plaintiffs in *Varity* were deceived into transferring from one subsidiary to another within the same company, and thus the relief in that case was measurable according to the defendants' gain, rather than the plaintiffs' loss. *LaRue v. DeWolff, Boberg & Assocs.*, 450 F.3d 570, 576 (4th Cir.2006) (holding that a plaintiff could not recover under ERISA § 502(a)(3) where he alleged that he lost money because his 401(k) plan administrator had failed to follow his directions for making changes to his investment, noting that the plaintiff "gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss-a measure that is traditionally legal, not equitable"); *Millsap*, 368 F.3d at 1253 (holding, in a § 510 case involving a plant closing, that back pay was not "appropriate equitable relief" because it measured the plaintiffs' loss rather than the defendants' gain). In *Varity*, the plaintiffs sought pension benefits for work they had actually done for their employer, and the court's decree was a matter of restoring the plaintiffs' benefits enrollment to the preexisting arrangement, thus undoing the effects of the defendants' deception. Here, however, the plaintiffs are seeking pension benefits for work they never did for AT&T or its former divisions, but which they argue they might have done had AT&T not adopted a hiring policy that they claim violated ERISA. The remedy they seek is thus akin to "back pay," which is not an equitable

remedy within the meaning of the statute. *Great-West,* 534 U.S. at 218 n. 4, 122 S.Ct. 708; *see also Millsap,* 368 F.3d at 1253 ("[P]aying backpay damages is like paying an extra worker who never came to work." (quoting *Ford Motor Co. v. EEOC,* 458 U.S. 219, 229, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982))); *id.* at 1254 ("Plaintiffs' proposed method of calculating their backpay award is based on each individual class member's loss rather than Defendant's gain . . . [and] is thus in the nature of compensatory damages."); 2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) at 226 (2d ed.1993) ("Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due, for example . . . [s]o, while reinstatement is clearly equitable as a form of injunctive relief, back pay seems to be just as clearly legal.") (footnotes omitted).

Second, the Court in *Varity* did not rule on the question of whether the relief sought was "equitable" within the meaning of the statute, because the defendants stipulated that it was. 516 U.S. at 508, 116 S.Ct. 1065 ("Varity *concedes* that the plaintiffs satisfy most of this provision's requirements, namely, that the plaintiffs are plan 'participants' or 'beneficiaries,' *and that they are suing for 'equitable' relief to 'redress' a violation of § 404(a),* which is a 'provision of this title.' " (emphasis added)); *see also Great-West,* 534 U.S. at 221 n. 5, 122 S.Ct. 708 ("In *Varity* . . . it was undisputed that the respondents were seeking equitable relief . . ." (emphasis omitted)).

Cox I and *Cox II* are also unavailing as support for the plaintiffs' position. It is true that those decisions addressed whether there is a right to a jury trial in actions under ERISA

§ 502(a)(1)(B), and that ultimately we decided there is not, because such actions are analogous to actions for breach of trust, which were typically heard in courts of equity. *See Cox II,* 894 F.2d at 649 (citing *Turner v. CF & I Steel Corp.*, 770 F.2d 43 (3d Cir.1985)). It does not follow, however, that all relief available for a breach of trust at common law is "equitable relief" within the meaning of § 502(a)(3) of ERISA. The Supreme Court explicitly rejected that argument in *Mertens,* 508 U.S. at 258, 113 S.Ct. 2063 (holding that the term "equitable relief" in § 502(a)(3) does not mean "all relief available for breach of trust at common law").

Neither does *Adams* require a result contrary to our decision here. In the context of determining whether the plaintiffs in that case were entitled to a jury trial on their claims, the Tenth Circuit explained that the recovery of benefits due under the terms of a plan is analogous to equitable restitution. 149 F.3d at 1162. As discussed above, however, the plaintiffs are not seeking benefits that were wrongly withheld for work they performed for the defendants. Rather, they are seeking an award of benefits as an approximation of the loss they suffered as a result of what they say is the defendants' violation of § 510 of ERISA. As the Supreme Court explained in *Great-West,* this amounts to a claim for *legal* damages, not *equitable* restitution, and thus is relief not available to the plaintiffs in this case. 534 U.S. at 213-14, 122 S.Ct. 708 (explaining the difference between legal and equitable relief); *Skretvedt v. E.I. DuPont De Nemours,* 372 F.3d 193, 210-12 (3d Cir.2004) (same).

We therefore agree with the District Court that the relief the plaintiffs sought is not "equitable" within the meaning of ERISA § 502(a)(3).

C

Finally, the plaintiffs argue that the District Court's grant of summary judgment is contrary to the mandate of this Court, and that its reading of § 502 would render § 510 of ERISA without effect. Both of those arguments are without merit.

A district court must "implement both the letter and spirit of the mandate" it receives from this Court, but district courts are free to "consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949-50 (3d Cir.1985) (citing cases). We held in the previous appeal that the plaintiffs had presented sufficient evidence to survive a summary judgment motion that argued the defendants lacked any intent to interfere with the plaintiffs' pension benefits. We neither explicitly nor implicitly ruled on the question of whether any of the relief the plaintiffs sought was available under § 502, and that issue was therefore open for the District Court to address on remand.

The plaintiffs argue, however, that the defendants' failure to raise the issue of whether § 502 afforded the plaintiffs any relief resulted in a waiver of that issue. For that proposition, they rely on our decision in *Skretvedt*. In *Skretvedt*, the plaintiff filed an eight-count complaint, the District Court granted summary judgment to the defendants on all eight counts, and the plaintiff only appealed as to two of the eight counts. 372 F.3d at 197-99. The plaintiff won a remand on appeal and then sought to relitigate on remand some of the remaining six counts for which he had not

secured a remand. *Id.* at 199. We held that the plaintiff had waived any right to recover on those claims by not challenging the District Court's grant of summary judgment on those claims in the first appeal. The panel stated that "[w]e have consistently rejected such attempts to litigate on remand issues that were not raised *in a party's prior appeal* and that were not explicitly or implicitly remanded for further proceedings." *Id.* at 203 (emphasis added); *see also Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 88 (3d Cir.1987) ("An issue that is not addressed in *an appellant's brief* is deemed waived on appeal.") (emphasis added).

Here, however, the defendants were the *appellees* in the previous appeal. As such, they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds. *See Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir.2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals."); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C.Cir.1995) ("[F]ull application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal, [and t]hat dilemma, together with the potential judicial *dis*economies of forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.") (original emphasis).

We also reject the plaintiffs' argument that the District Court's construction of § 502(a) renders § 510 ineffective. As the Supreme Court has noted, the "prototypical" claim under § 510 of ERISA is when an employer terminates an employee to prevent his pension rights from vesting. *Ingersoll-Rand,* 498 U.S. at 143, 111 S.Ct. 478. Under such circumstances, the typical remedy is reinstatement, which is an equitable remedy within the terms of the statute. 2 Dobbs § 6.10(5) at 226. It may be that § 502(a) restricts the scope of § 510 as a practical matter by leaving without remedy some violations of § 510 that differ from the "prototypical" case. That the plaintiffs are without a remedy in this case, however, does not render § 510 ineffective in all cases, and thus does not implicate the canon of statutory interpretation that cautions against interpreting a statute so as to render one part inoperative. *See generally United States v. Menasche,* 348 U.S. 528, 538, 75 S.Ct. 513, 99 L.Ed. 615 (1955).

IV

For the foregoing reasons, we will affirm the judgment of the District Court.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on behalf of all others similarly situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS.

Appellants

v.

AT & T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10

Appendix B

On Appeal From the United States District Court
for the District of New Jersey,
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587)
District Judge: Honorable Stanley R. Chesler

Submitted Under Third Circuit LAR 34.1(a)
March 27, 2007

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on March 27, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED that the judgment of the District Court be and the same is hereby AFFIRMED, all of the above in accordance with the opinion of this Court.

Costs taxed against Appellants.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: May 2, 2007

Costs taxed in favor of Appellee, Texas Pacific Group as follows:

Brief	$123.26
TOTAL	$123.26

APPENDIX C — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 31, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on behalf of all others similarly situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS,

Appellants

v.

AT & T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10.

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On Appeal From the United States District Court
for the District of New Jersey,
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
RENDELL, AMBRO, FUENTES, SMITH,
FISHER, CHAGARES, JORDAN and ROTH *,
Circuit Judges.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Ambro concurs in the decision to deny rehearing en banc and files a separate opinion attached hereto with respect to the decision to deny rehearing en banc.

BY THE COURT,

/s/ Kent A. Jordan
Circuit Judge

Dated: May 31, 2007

* As to panel rehearing only.

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AMBRO, *Circuit Judge*, concurring in denial of the petition for rehearing *en banc*.

I vote to deny rehearing *en banc* because I believe the panel decision correctly applies *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). As the panel concludes, the focus of those opinions-particularly *Mertens* and *Great-West*-is that any make-whole monetary relief that is not directly traceable to some wrongly held property is properly characterized as legal. not equitable, relief, and is thus unavailable in a 29 U.S.C. § 1132(a)(3) action. Slip. Op. at 24. Under this rubric, Eichorn's request for an adjustment of pension records that would create a payment obligation is clearly unavailable.

Though I agree with the panel's opinion, I write separately to urge Congress or the Supreme Court to revisit what Judge Becker called "an unjust and increasingly tangled ERISA regime." *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir.2003) (Becker, J., concurring). As Justice Ginsburg noted a few years ago,

> [b]ecause the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided."

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Aetna Health Inc. v. Davila, 542 U.S. 200, 222, 124 S.Ct. 2488, 159 L.Ed.2d 312 (quoting *DiFelice*, 346 F.3d at 456-57) (Ginsburg, J., concurring).

Nowhere is that more apparent than this case. We held in *Eichorn I* that the plaintiffs here have produced sufficient evidence that AT & T and Lucent intentionally interfered with their ERISA benefits to survive summary judgment. *Eichorn v. Am. Tel. & Tel. Corp. (Eichorn I)*, 248 F.3d 131, 150 (3d Cir.2001). Now, however, we are compelled to affirm the entry of summary judgment in the defendants' favor, not because of a failure of proof, but because ERISA-as the Supreme Court interprets it—does not provide a remedy. As the panel notes, plaintiffs asserting an interference claim can only seek injunctive relief or reinstatement;[1] they cannot seek make-whole monetary relief of any kind. Slip. Op. at 31. What makes this result odd is that the preferred remedy for the common law analog of this claim-interference with an expectancy—is money damages. *See* Restatement (Second) of Torts § 774B & cmt. e. Thus, to accept the *Mertens/ Great-West* formulation is to accept that Congress specifically allowed ERISA participants to pursue a cause of action for interference but, with no relevant comment in the legislative history, disallowed the most natural remedy. At risk of using another canine metaphor,[2] this result is odd enough that its

1. The panel also notes that in theory they could seek a constructive trust or equitable lien over identifiable wrongly held property, though it is most doubtful that those remedies would be appropriate in an interference claim. *See* Slip Op. at 24 n. 6.

2. I fear that our Court has had its fill of those after the *Grier* case. *See United States v. Grier*, 475 F.3d 556, 568 n.8. (3d Cir.2007) (en banc); *id.* at 579-87 (Ambro, J., concurring in judgment); *id.* at 598 (Sloviter, J., dissenting); *id.* at 616 (McKee, J., dissenting).

silent passage strikes me like "the curious incident of the dog in the night-time."[3] Moreover, as Professor John Langbein has argued, *Mertens* and *Great-West* employ a concept of "equitable relief" so narrow that it ignores the fact that chancery courts regularly awarded monetary make-whole relief in appropriate circumstances, particularly to trust beneficiaries. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. L.Rev. 1317, 1353-62 (2003).

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3. [Gregory:] "Is there any point to which you would wish to draw my attention?"

> [Sherlock Holmes:] "To the curious incident of the dog in the night-time." "The dog did nothing in the night-time."
>
> "That was the curious incident," remarked Sherlock Holmes.
>
> . . . .
>
> [Sherlock Holmes:] "Before deciding that question I had grasped the significance of the silence of the dog, for one true inference invariably suggests others. The Simpson incident had shown me that a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was someone whom the dog knew well."

ARTHUR CONAN DOYLE, *Silver Blaze, in* The Complete Sherlock Holmes 383, 400 (1938); *see also Chisom v. Roemer*, 501 U.S. 380, 396 n. 23, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

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This case demonstrates that the *Mertens/ Great-West* definition of "equitable relief" functionally prohibits many legitimate plaintiffs from seeking an ERISA remedy. As the panel opinion notes, it does not cut off all relief. Slip Op. at 31. Here, for example, the District Court could have enjoined AT & T and Lucent from enforcing the anti-"bridging" agreement. But by the time the case was ready for trial, the six-month window for rehiring AT & T/Lucent employees had long passed, rendering such an injunction worthless.

This result is not uncommon. Because of the complexity of much ERISA litigation (not to mention the shortage of federal judges), it tends to move slowly. The very predicate of an interference claim is that the defendant is keeping the plaintiff from benefits to which he would otherwise be entitled. *See* 29 U.S.C. § 1140. The longer that interference continues, the less likely it is that injunctive relief will provide a workable remedy. Even in the typical case-one in which an employee is fired to prevent benefits from vesting, *see* Slip Op. at 31-the propriety of reinstatement wanes over time as the employee ages and the nature of the employer's business changes. In these cases, time is on the defendant's side in an insidious way, for by drawing out the litigation it has a chance of mooting the entire suit. The end result is that for plaintiffs like Eichorn the case is won or lost at the preliminary injunction stage, for only that remedy will prevent the case becoming moot while discovery proceeds. This is both unfair and against the grain of our civil justice system, which couples notice pleading with liberal discovery rules to ensure that " 'the gravamen of the dispute [is] brought frankly into the open for the inspection of the court.' " *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct.

992, 152 L.Ed.2d 1 (2002) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1202 (2d ed.1990)). Here, accepting the opportunity for discovery (or merely responding to a motions-happy defendant) can render worthless the proof the plaintiff produces. It is hard to imagine that this narrow window of relief is the result Congress intended.

Judicial[4] and scholarly[5] concern could hardly be higher.

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4. *See, e.g., Lind v. Aetna Health, Inc.*, 466 F.3d 1195, 1200 (10th Cir.2006) (McConnell, J.) (noting that *Mertens* and *Great-West* produce "lopsided results"); *Pereira v. Farace*, 413 F.3d 330, 345-46 (2d Cir.2005) (Newman, J., concurring) (questioning the *Great-West* definition of equity); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1266 (10th Cir.2004) (Lucedo, J., dissenting) ("Here, reinstatement would have been an appropriate equitable remedy had McDonnell Douglas not so delayed proceedings as to make reinstatement impossible. Thus, through no fault of their own, the class plaintiffs find themselves devoid of the undeniably appropriate equitable remedy of reinstatement."); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d at 453 (Becker, J., concurring); *id.* at 468 (Ambro, J., concurring); *Cicio v. Does*, 321 F.3d 83, 107 (2d Cir.2003) (Calabresi, J., dissenting); *Van Natta v. Sara Lee Corp.*, 439 F.Supp.2d 911, 941 (N.D.Iowa 2006) (Bennett, C.J.); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 55-56 (D.Mass.1997) (Young, J.).

5. *See, e.g.*, Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable Relief" under ERISA Section 502(a)(3)*, 39 J. Marshall L.Rev. 827 (2006); Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration, and Other Employee Benefit Woes-Evaluating ERISA at Age Thirty*, 53 Buff. L.Rev.. 1193 (2005) (reviewing James A Wooten, The Employee Retirement Income

(Cont'd)

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It is time for Congress or the Supreme Court to reconsider the interplay between the extent to which make-whole monetary relief is available under 29 U.S.C. § 1132(a)(3) and the preemption of state-law causes of action that could accord that relief.

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Security Act of 1974-A Political History (2004)); Lorraine Schmall & Nathan Ihnes, *Failure of Equity: Discriminatory Plan Closing as an Irreemediable Injury under ERISA*, 55 Cath. U.L.Rev. 81 (2005); Sarah Beth Spisich, *The Aftermath of* Davila: *Are Healthcare Enrolees Now a Sinking Ship Without a Paddle?*, Health Law. 22 (Aug.2005); James J. Budney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L.Rev.. 1, 79-81 (2005); Robert F. Rich, et al., *Judicial Interpretation of Managed Care Policy*, 13 Elder L.J. 85 (2005); Scott M. Aronson, *ERISA's Equitable Illusion: The Unjust Justice of Section 502(a)(3)*, 9 Employee Rts. & Empl. Pol'Y J. 247 (2005); Langbein, *supra*; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 256-72 (2003); John M. Teske, Note, *Damage Suits Under ERISA: Why Third Parties with Discretion over Benefit Plans Must Be Held Accountable*, 36 Loy. L.A. L.Rev.. 1753 (2003); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 Smu L.Rev. 1577 (2002); Daniel J.Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup.Ct. Rev. 343, 383-84 & n. 164; Lisa N. Bleed, Note, *Enforcing Subrogation Provisions as "Appropriate Equitable Relief" Under ERISA Section 502(a)(3)*, 35 U.S.F. L.Rev. 727 (2001); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. Pa. J. Lab. & Emp. L. . 391 (2000); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Health Benefits, False Employer Promises and the Protective Judiciary*, 9 DePaul Bus. L.J. 305 (1997); Karen A. Jordan, Travelers

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Insurance: *New Support for the Argument To Restrain ERISA Pre-emption*, 13 Yale J. on Reg. 255 (1996); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 Notre Dame L.Rev. 861, 894-96 (1996); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 Iowa L.Rev. 1 (1995); Susan J. Stabile, *Preemption of State Law by Federal Law: a Task for Congress or the Courts?*, 40 Vill. L. Rev. . 1, 33-35 (1995); Maria Linda Cattafesta, Note, *Mertens v. Hewitt Associates: Nonfiduciary Liability for Money Damages under ERISA*, 43 Cath. U.L.Rev. 1165 (1994); Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: an Abdication of Judicial Law-Creating Authority*, 46 Fla. L.Rev. 355 (1994); Robert A. Kamp, *The Argument for "Extra-Contractual" Damages under ERISA*, 82 Ill. B.J., 70 (1994); Richard Rouco, Note, *Available Remedies under ERISA Section 502(a)*, 45 Ala. L.Rev. 631 (1994); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U. L.Q., 671 (1994); Gregory A. Hewett, Note, *Should Non-Fiduciaries Who Knowingly Participate in a Breach of Fiduciary Duty Be Liable for Damages under ERISA?*, 71 Wash. U. L.Q., 773 (1993).

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 22, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler, U.S.D.J.

Civ. No. 96-3587

KURT H. EICHORN, et al.,

plaintiffs,

v.

AT&T CORP.; LUCENT TECHS. INC.; TEXAS PACIFIC GROUP; NCR CORP.; THE CIT GROUP, INC.; AND "JOHN DOE" CORPS. 1-10,

defendants.

OPINION

CHESLER, District Judge

This matter comes before the Court on a motion by the defendant Texas Pacific Group ("TPG"), pursuant to Rule 56, for summary judgment against the plaintiffs. [Docket Entry Nos. 173 & 174.] Defendants Lucent Technologies, Inc. ("Lucent"), AT&T Corporation ("AT&T"), and NCR Corporation ("NCR") join in TPG's motion. In this action, plaintiffs seek relief against the defendants under the

Employees Retirement Income Security Act ("ERISA") for allegedly foreclosing certain retirement benefits to which they were entitled. Plaintiffs invoke Section 510 of ERISA, 29 U.S.C. § 1140, through its remedial mechanisms, Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) and Section 502(a)(3), 29 U.S.C. § 1132(a)(3).[1] For the reasons set forth below, defendants' motion is granted.

I. FACTS

A. Factual Background

This case involves AT&T's sale of a subsidiary, Paradyne Corporation ("Paradyne"), and the effect of that sale on the retirement benefits of the plaintiffs, Paradyne employees.

In 1989, AT&T acquired Paradyne, a maker of telecommunications network access products, and operated it as a wholly-owned subsidiary. Paradyne's employees were covered by a pension plan established by AT&T and adopted by its affiliates (the "AT&T Plan"). (Final Pretrial Order ("FPO") at 8, ¶ 13.) Plaintiffs contend that the AT&T Plan allowed an employee who left one AT&T company and, within six months, was re-employed by another AT&T company, to receive credit for all prior service and, as a vested pension plan participant, to immediately begin to accrue additional pension benefits. (*Id.*) Plaintiffs further contend that if re-employment were to occur after a break in AT&T service of more than six months, the employee would have

1. The Court will refer to these provisions as Section 510, Section 502(a)(1)(B), and Section 502(a)(3), respectively.

to remain employed for an additional five years to bridge the two terms of employment for pension purposes. (*Id.*)

On October 18, 1995, AT&T announced its intent to sell Paradyne. (*Id.* at 6, ¶ 6.) Plaintiffs contend that, to make Paradyne more attractive to buyers, AT&T adopted a policy, known as the "Preliminary Net," that prohibited Paradyne employees from transferring to other jobs within the AT&T companies. (*Id.* at 6, ¶ 6.) Plaintiffs maintain that the reason for the hiring bar was AT&T's belief that one of Paradyne's most marketable assets was its skilled employees and retention of those employees was considered essential for the sale of Paradyne. (*Id.* at 8, ¶ 15-16.) Plaintiffs further contend that retaining Paradyne employees further served the defendants' interests of maintaining its viability as a supplier of telecommunications equipment to AT&T and its affiliates. (*Id.* at 7, ¶ 11-12.)

In November of 1995, AT&T reorganized, resulting in the creation of three separate companies: AT&T, Lucent, and NCR. (FPO at 5, ¶ 6.) This reorganization is known as the "AT&T Trivestiture." As part of the AT&T Trivestiture, AT&T transferred Paradyne to Lucent. (FPO at 5, ¶ 2.) Pursuant to the Preliminary Net, Paradyne employees remained precluded from seeking employment at other AT&T companies.

TPG became interested in acquiring Paradyne from Lucent and, in April of 1996, began negotiating its purchase. (*Id.* at 6, ¶ 3; 8, ¶ 14.) Negotiations culminated in the June 18, 1996 Purchase Agreement between TPG and Lucent. (*Id.* at 8, ¶ 14.) The Purchase Agreement included a further

hiring restriction that prohibited AT&T, Lucent, and their respective affiliates from hiring anyone who had been employed at Paradyne since June 1, 1996 and whose compensation was greater than $50,000. (*Id.* at 8, ¶ 16; Certification of David Michael Fabian ("Fabian Cert."), Ex. A at ¶ 4.5 therein.) This prohibition is referred to as the "Pre-Closing Net." On June 19, 1996, Paradyne employees were advised of the sale and, further, that their retirement benefits under the AT&T Plan would be discontinued. (FPO at 8, ¶ 16.) In effect, the Pre-Closing Net extended the prohibition on Paradyne employees' ability to transfer employment to AT&T affiliates.

The Paradyne deal closed on July 31, 1996. (*Id.* at 8, ¶14.) At the closing, parties to the transfer executed the "Employee Matters Agreement," which extended the Pre-Closing Net for eight months after the closing. (*Id.* at 8, ¶ 18.) Plaintiffs claim that the Preliminary Net, the Pre-Closing Net, and the Employee Matters Agreement (collectively the "Nets") guaranteed that they could not enjoy the AT&T Plan's benefit of bridging their accrued retirement credit by becoming re-employed by another AT&T company within six months. (*Id.* at 8, ¶ 25.) Plaintiffs claim that this interfered with accrual of their retirement benefits solely for the purpose of increasing the defendants' profits. (*Id.* at 8, ¶ 19.)

B. Procedural History

As a result of these events, plaintiffs filed a number of cases that resulted in the instant consolidated matter, *Eichorn*

v. AT&T Corp., 96-3587 (hereinafter "*Eichorn*").[2] Plaintiffs

2. *Eichorn* was filed on July 24, 1996 by a putative class action of Paradyne employees against AT&T, Lucent, and TPG. The second action, *Daly v. AT&T Corp.*, 96-4674 (MLC) (hereinafter "*Daly*"), was filed on October 3, 1996 and, on November 20, 1996, was consolidated with *Eichorn*. By order dated March 29, 1999, the Honorable Mary L. Cooper granted summary judgment to the defendants in those actions dismissing plaintiffs' antitrust claims. [Docket Entry No. 42.] By order dated August 23, 1999, Judge Cooper denied plaintiffs' application for class discovery and dismissed plaintiffs' ERISA claims. [Docket Entry No. 48.] Plaintiffs appealed Judge Cooper's decisions.

While *Eichorn* was on appeal, plaintiffs' counsel filed *Lawless v. AT&T Corp.*, 00-0081 (hereinafter "*Lawless*") and *Brugner v. AT&T Corp.*, 00-3008 (hereinafter "*Brugner*"). The claims in *Lawless* and *Brugner* arose from the same facts as *Eichorn* and differed only insofar as they were not putative class actions, and they named NCR and CIT as defendants.

The Court of Appeals for the Third Circuit affirmed Judge Cooper's decision with respect to plaintiffs' antitrust claims, but reversed her ruling with respect to the ERISA claims. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 150 (3d Cir. 2001) (holding "plaintiffs have presented sufficient circumstantial evidence of intent to interfere with their pension rights to create a genuine issue of material fact."). The Court of Appeals for the Third Circuit did not address whether or not the relief that plaintiffs sought was recoverable under Section 502 of ERISA. For this reason, the instant motion does not seek to overturn what is now law of the case, as plaintiffs argue. (*See* Pl.'s Br. at 2-3.)

Accordingly, plaintiffs' ERISA claims were remanded to this Court with the direction that the District Court address plaintiffs'

(Cont'd)

alleged that the Nets violated Section 1 of the Sherman Act and had the effect of "interfering with the attainment of certain rights with respect to plaintiffs' benefits in violation of ERISA Section 510. [Docket Entry No. 1.] Only the ERISA claims remain.

On December 12, 2003, TPG filed a motion to strike testimony and related calculations of plaintiffs' damages witness, Stephen A. Crowley, and to enter summary judgment in defendants' favor. [Docket Entry No. 149.] On August 18, 2004, the Court granted defendants' motion to strike plaintiffs' damages witness and requested supplemental briefing on whether or not plaintiffs should be permitted to make additional damages submissions. [Docket Entry No. 156.] On November 10, 2004, after supplemental briefing, the Court entered an Order that (1) barred plaintiffs from submitting Mr. Crowley's calculations, reports, and testimony; (2) denied plaintiffs leave to add expert witnesses or submit calculations, reports, or testimony of such witnesses; (3) denied defendants' motion for summary judgment; (4) expressly reserved on the issue of "whether plaintiffs can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiff's pension benefits"; and (5) directed the parties to confer with Magistrate Judge Hughes to schedule discovery on remaining damages issues. [Docket Entry No. 163.]

(Cont'd)

motion for class discovery. *Eichorn*, 248 F.3d at 150. On August 28, 2001, *Lawless* and *Brugner* were consolidated with *Eichorn*. [Docket Entry No. 66.] The case was reassigned to the Undersigned on December 20, 2002. [Docket Entry No. 95.]

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Defendants filed the instant motion on May 19, 2005. [Docket Entry Nos. 173 & 174.] In their motion, the defendants generally argue that ERISA Section 502(a) does not allow recovery for plaintiffs' claims. (*See* Def.'s Br. at 4-13.) Defendants argue that plaintiffs' only possible theories of recovery are under Sections 502(a)(1)(B) and Section 502(a)(3). (*Id.* at 5-7.) Defendants argue plaintiffs cannot recover under Sections 502(a)(1)(B) because they allege that the defendants interfered with their ability to obtain rights under the AT&T Plan, not the breach of the Plan provision, which is the sole conduct for which that section provides a remedy. (*Id.* at 7.) Defendants further argue the compensatory damages that plaintiffs seek are not "appropriate equitable relief" under Sections 502(a)(3). To address these arguments, the Court must analyze the alleged conduct at issue and the nature of plaintiffs' claimed damages.

C. Defendants' Alleged Conduct

Plaintiffs do not seek recovery for a breach of the AT&T Plan, but for interference with benefits to which they would have been entitled had they remained subject to the AT&T Plan. Specifically, plaintiffs claim that the purpose of the Nets was to "thwart the predictable efforts of Paradyne employees to find employment with other units of the former AT&T organization, thereby preventing them from remaining as vested participants in an ongoing pension plan with the right to add more service time to their existing pension credits." (FPO at 9, ¶ 22.) Plaintiffs claim that the Nets had the effect of "preventing the Paradyne workers from attaining or enjoying the benefits of the pension-bridging provisions to which they are entitled as pension plan participants."

(*Id.* at 13, ¶ 46.) In their motion papers, plaintiffs state that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.)

D. Plaintiffs' Alleged Damages

On June 27, 2005, United States Magistrate Judge John J. Hughes entered the Final Pretrial Order in this case. [Docket Entry No. 194.] Item 6.B.[3] of the Final Pretrial Order states that plaintiffs will call 25 former Paradyne employees and "[a]ll such testimony will correspond closely to information provided in depositions and responses to written discovery requests, the answers to interrogatories propounded by defendants . . . near the end of 2004 in particular." (*Id.* at 30.) The answers to interrogatories to which plaintiffs refer are attached to Mr. Fabian's certification as Exhibits H through DD. The relevant interrogatory, number 5, asked plaintiffs to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." (*See, e.g.*, Fabian Cert., Ex. H at 5.) Plaintiffs' interrogatory answers

3. Part 4.B. of the Final Pretrial Order requires plaintiffs to list each contested fact they intend to prove with respect to damages, including "each item of damages, the amount of each item, [and] the factual basis for each item . . . ." (FPO at 13, Part 4.B.) In response to this, plaintiffs state "the factual showing as regards to damages is set forth in Section 6.B. below." (*Id.*)

reflect calculations, pursuant to various formulae[4], of money they would have received but for the defendants' alleged interference. By way of example, in her March 20, 2005 response to the damages interrogatories, plaintiff Judith B. Brugner set forth the calculation by which she claimed that her damages amount to $298,252.57. (*Id.*, Ex. H at 6-7.) Ms. Brunger stated:

> I base these damage calculations on taking retirement on January 15, 2000 after reaching 20 years' service to qualify for an unreduced service pension under the Transition Benefit Formula which is applicable to employees who became eligible for retirement during the period from January 1, 1997 to December 31, 2000, and is based on earnings from 1991 through 1996.

(*Id.*, Ex. H at 6-7.) After applying the proposed formula, Ms. Brunger concluded:

> The combination of the accrued pension payments with interest thereon that I should have received

4. The calculations involve an application of different formulae that the plaintiffs claim apply to the AT&T Plan, including the "Transition Formula" (*see* Fabian Cert., Ex. H at 5-7; Ex. I at 4-6; Ex. Q at 4-7; and Ex. R at 5-7), the "Lucent Retirement Income Plan Service Program Summary Plan Description effective 1/1/2000, updated 11/20/2000" (*see id.*, Ex. J at 15-16; Ex. K at 5; Ex. L at 5-6; Ex. M at 4-5; Ex. P at 6-9; Ex. U at 6-8; Ex. W at 5-6; and Ex. Y at 4-7), and the like (*see id.*, Ex. N at 4-5; Ex. O at 4-5; Ex. S at 4-6; Ex. T at 4-6; Ex V at 4-7; Ex. X at 5-7; Ex. Z at 5-7; Ex. AA at 4-6; Ex. BB at 4-5; and Ex. CC at 5-7.). The details of these formulae are not relevant to this opinion.

> through April 30, 2005 ($128,290.35) plus my additional damages for lost pension benefits subsequent to that date as determined by the cost of an annuity ($169,962.22) results in total damages of $229,252.57.

(*Id.*, Ex. H at 7.) The interrogatory responses do not state that the plaintiffs seek equitable relief, but rather frame the plaintiffs' damages solely in terms of a monetary amount.

Plaintiffs' legal theories, referred to in part 13 of the Final Pretrial Order, preserved the following legal issues:

> 3. Should Lucent and/or AT&T be compelled in the exercise of the Court's equitable jurisdiction to adjust plaintiffs' existing pension rights by crediting them with the service time they failed to accrue as a result of the no-hire agreement?
>
> 4. Have plaintiffs correctly calculated the monetary values of the pension benefits lost through interference with their ability to continue holding pension-bearing employment up to the present time, or such sooner time as would have qualified them to receive pension benefits?

(FPO at 86.) While issue 3 mentions the "Court's equitable jurisdiction," it does not reference the equitable remedy sought, such as specific performance, injunction, or an equitable lien.

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Plaintiffs' opposition to the instant motion introduces the concept of an "equitable decree" but does not elucidate the remedy they seek. With respect to Section 502(a)(1)(B), plaintiffs argue that their recovery:

> involves no more than the simple task of determining what amount of pension service time plaintiffs lost through violation of § 510, adding that service time to the time already recorded for their former service, and recalculating their pension benefits *mutatis mutandis*[5] under the plan formula. It is a process that can easily be viewed as an illustration of the maxim that equity regards as done what ought to be done.

(Opp. Br. at 5) (citations and internal quotation marks omitted, footnote added). With regard to Section 502(a)(3), plaintiffs argue they seek "pay only in the sense that pensions were part of their total compensation, and a decree which remedies the denial of their right to continue earning pension credits up to the present time will serve essentially the same purpose as a conventional back pay award." (Pl.'s Br. at 15.) Plaintiffs further argue "any award for sums adjudged due as 'back pay' pension benefits will necessarily be ancillary to an equitable decree crediting plaintiffs with the additional service." (*Id.* at 16.)

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5. *Mutatis Mutandis* means "[a]ll the necessary changes having been made; with the necessary changes." Black's Law Dictionary 832 (7th ed. 2000).

Appendix D

III. DISCUSSION

A. Summary Judgement Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). An issue is "genuine" if a reasonable factfinder could possibly hold in the nonmovant's favor with regard to that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. *Id.* at 248. At the summary judgment stage, a court may not weigh the evidence or make credibility findings; "these tasks are left for the fact-finder." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Therefore, to raise a genuine issue of material fact, "'the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Id.*; *see also Anderson*, 477 U.S. at 252 (holding "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]."). In short, summary judgment is proper in the event that, even taking all factual disputes in a light most favorable to the plaintiff, relief could not be granted.

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B. Plaintiffs' ERISA Claim

Plaintiffs' claims are grounded in Section 510 of ERISA, 29 U.S.C. § 1140. Section 510 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

Section 502 is the civil enforcement provision of ERISA and provides certain remedies for the breach of ERISA sections such as 510. 29 U.S.C.A. § 1132. Section 502 provides that a civil action may be brought:

> (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant beneficiary or fiduciary for appropriate relief under section [409 of ERISA]; [and]
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of the subchapter or the terms of

> the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan.

29 U.S.C. § 1132. Plaintiffs seek recovery under Section 502(a)(1)(B) and Section 502(a)(3).

1. ERISA Section 502(a)(1)(B)

Defendants argue that Section 502(a)(1)(B) does not provide a remedy for plaintiffs' Section 510 claims because plaintiffs claim the Nets interfered with their ability to accrue benefits under the AT&T Plan, rather than a breach of the AT&T Plan itself. (Def.'s Br. at 7.) In opposition, plaintiffs argue that both legal and equitable relief, namely the recovery of pension benefits, enforcement of plan rights, and clarification of future benefits, are recoverable under Section 502(a)(1)(B). (Pl.'s Opp. Br. at 3-8.) For the following reasons, the Court holds that plaintiffs cannot recover under Section 502(a)(1)(B) as a matter of law.

Section 510 "is not concerned with whether a defendant complied with the contractual terms of an employee benefit plan. Rather, the emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan." *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir.

1992). In this regard, the Court of Appeals for the Seventh Circuit has stated:

> In order to enforce the terms of a plan under Section 502, the participant must first qualify for the benefits provided in that plan. *See* 29 U.S.C. § 1132. Rather than concerning itself with these qualifications, one of the actions which Section 510 makes unlawful is the interference with a participant's ability to meet these qualifications in the first instance.

Id. at 1134 (citations omitted). Therefore, Section 510 is aimed at prohibiting interference with the rights of plan beneficiaries. Section 502(a)(1)(B), on the other hand, provides a remedy for the assertion of a contract right under an employee benefit plan. *Id.* at 1133. Thus, a violation of Section 510 (prohibition of *interference with the attainment of a right* to which a participant "may become entitled under a plan") is inconsistent with the remedy provided under Section 502(a)(1)(B) (recovery of benefits "*due . . . under the terms of his plan*").

The United States District Court for the Eastern District of New York drew the same distinction in *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 150 (E.D.N.Y. 1996). In *Russell*, the plaintiff sued his employer when he was fired just months shy of his twentieth anniversary with the company, at which time he would have been entitled to 65% of his pension once he reached age 50. *Id.* at 146. Plaintiff alleged that defendant terminated his employment to interfere with his rights under the pension plan. *Id.* In dismissing

plaintiff's claims under ERISA Section 502(a)(1)(B), the *Russell* court noted that alleged violations of Section 502(a)(1)(B) "must be of the *terms* of the plan to be actionable." *Id.* at 150 (emphasis in original) (citations omitted). Accordingly, the District Court held that the plaintiff could not recover under Section 510, through Section 502(a)(1)(B), because he sought redress for interference with the *entitlement* to benefits for which he had not yet qualified, and not *breach* of a term of the plan. *Id.*

Defendants' alleged conduct here cannot form the basis for recovery under Section 502(a)(1)(B). As in *Russell*, plaintiffs do not claim entitlement to relief already owed to them under the Plan, but from interference with their ability to obtain benefits. Specifically, plaintiffs claim that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.) Plaintiffs' attempt to recover money to which they would have been entitled but for the Paradyne transfer appears to be the very remedy that the *Russell* court held is not recoverable under Section 502(a)(1)(B). For the reasons stated in that case, therefore, the Court holds that plaintiffs cannot recover under Section 502(a)(1)(B) for a breach of Section 510.

Plaintiffs argue that *Varity Corporation v. Howe*, 516 U.S. 489 (1996) supports their claim under Section 502(a)(1)(B). *Varity* held, in part, that plaintiffs who claimed a breach of fiduciary duty under Section 409 of ERISA could not proceed under Section 502(a)(1)(B) "because they were no longer members of the . . . plan and, therefore, had no

'benefits due [them] under the terms of [the] plan.'" 516 U.S. at 515. Plaintiffs argue this is a tacit recognition that, had the plaintiffs in *Varity* been members of the plan, as plaintiffs in this case are, they could have proceeded under Section 502(a)(1)(B). (Pl. Br. at 7-8.) The majority in *Varity*, however, did not hold that a plaintiff alleging a violation of 510 can proceed under Section 502(a)(1)(B) if they were plan participants, nor did the court address the propriety of extra-contractual damages under Section 502(a)(1)(B). Notably, the dissent in *Varity*, citing prior Supreme Court precedent, stated as follows:

> Section 502(a)(1)(B) deals exclusively with contractual rights under the plan. It allows a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." As we recognized in *Russell*, this provision "says nothing about the recovery of extracontractual damages."

516 U.S. at 521 n.2 (Thomas, J., dissenting) (citing *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 144 (1985)). Accordingly, this Court's previous analysis applies to plaintiffs' argument under *Varity*. Because plaintiffs seek damages for interference with their rights, not breach of obligations under the AT&T Plan, Section 502(a)(1)(B) does not offer them a remedy. The Court does not read *Varity* to contradict this proposition.

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2. ERISA Section 502(a)(3)

Unlike the Court's analysis with respect to Section 502(a)(1)(B), the issue whether or not plaintiffs may proceed under Section 502(a)(3) requires the Court to focus on the *type* of damages sought.

Defendants characterize plaintiffs' alleged damages as "back pay." As such, they argue, plaintiffs' damages are remedies at law and, therefore, not recoverable under Section 502(a)(3), which allows only "appropriate equitable relief." (Def.'s Br. at 8-13.) Plaintiffs argue they are seeking back pay "only in the sense that pensions were part of their total compensation, and a decree which remedies the denial of their right to continue earning pension credits up to the present time will serve essentially the same purpose as a conventional back pay award." (Pl.'s Br. at 15.) For the reasons that follow, the Court holds that the relief plaintiffs seek is not "appropriate *equitable* relief" under Section 502(a)(3).

As stated previously, ERISA Section 502(a)(3) allows recovery "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan." 29 U.S.C. § 1132. Thus, recovery under Section 502(a)(3) is limited to equitable relief. "Equitable relief" under Section 502(a)(3) means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993). The present motion requires the Court to determine whether or not the relief that plaintiffs seek is

"equitable" in nature and, therefore, recoverable under this section.

It is undeniable that plaintiffs seek money they claim is due as a result of the defendants' alleged wrongdoing. Generally, such a recovery can only proceed under Section 502(a)(3) where (1) the damages are restitutionary in nature; or (2) where the back pay is incidental to a form of injunctive relief, such as reinstatement. *Russell,* 921 F. Supp. at 153. Plaintiffs' damages are neither.

i. Restitution

While "restitution" is among those remedies "typically available in equity," *Mertens,* 508 U.S. at 257, not all restitution constitutes "appropriate equitable relief" under Section 502(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson,* 524 U.S. 204 (2002) the Supreme Court distinguished between equitable restitution, which is recoverable under Section 502(a)(3), and legal restitution, which is not. In that case, the plaintiff, the insurer of an ERISA plan, sued the wife of a plan participant who was involved in a car accident and recovered medical benefits from the plan. 534 U.S. at 207. Plaintiff sought recovery under the reimbursement provision of the plan, for amounts the defendant recovered from a third-party in a tort action. *Id.* at 207-08. Plaintiff argued the damages it sought were "equitable" under *Mertens* and, therefore, recoverable under Section 502(a)(3). *Id.* at 210. In rejecting *Great-West*'s argument, the court reasoned as follows:

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In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. 1 Dobbs § 4.2(1), at 571. *See* also Muir, *supra,* at 37. In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Restatement of Restitution § 160, Comment *a*, pp. 641-642 (1936). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

In contrast, a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. *See* 1 Dobbs § 4.3(1), at 587-588; Restatement of Restitution, *supra,* § 160, Comment *a*, at 641-642; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978). A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.

> But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, § 215, Comment *a*, at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West, 534 U.S. at 213-14 (emphasis in original). With this standard in mind, the Court turns to plaintiffs' alleged damages.

Plaintiffs have expressly abandoned any claim to restitution. In their opposition brief, plaintiffs state that they "have no need for a theory of recovery grounded on 'restitution.'" because they seek "relief from conduct in violation not of a private contract but ERISA itself . . . ." (Pl.'s Br. at 15.) Accordingly, the Court need not reach the issue of whether or not plaintiffs' purported damages are the sort of restitution typically available in equity.

Had it reached the issue, however, the Court would hold that the relief that plaintiffs seek is not equitable in nature and, therefore, not recoverable under Section 502(a)(3). As a general matter, the forced transfer of funds from the defendants to the plaintiffs "would not be a viable remedy because '[a]lmost invariably . . . suits seeking . . . to compel

the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty.'" *Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 445 (S.D.N.Y. 2002). Plaintiffs do not seek recovery of money to which they are entitled, but rather recovery of benefits to which they would have been entitled had defendants not interfered with their rights. For example, in their Final Pretrial Order, plaintiffs preserve as a legal issue whether or not they have correctly calculated the monetary value of lost benefits due to defendants' "interference with their ability to continue holding pension-bearing employment up to the present time, or such sooner time as would have qualified them to receive pension benefits." (FPO at 86.) Moreover, in their Opposition Brief, plaintiffs claim that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.) Thus, their recovery is not for the turn-over of a thing to which they are entitled, it is for the award of money damages. This theory falls squarely within what the *Great-West* court held to be "restitution at law," 534 U.S. at 213, which is not recoverable under Section 502(a)(3).[6]

6. Nor have the plaintiffs argued that the remedy they seek amounts to an equitable lien or constructive trust. *See, e.g., Great-West*, 534 U.S. at 213 (holding restitution in equity is recoverable under Section 502(a)(3) "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."). Thus,

(Cont'd)

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ii. Incidental to Equitable Relief

Plaintiffs argue that damages are recoverable under Section 502(a)(3) because they are an integral part of an equitable remedy. (Opp. Br. at 16.) Plaintiffs state this differently by arguing "any award for sums adjudged due as 'back pay' pension benefits will necessarily by ancillary to an equitable decree crediting plaintiffs with the additional service." (*Id.*) Defendants argue that plaintiffs' recasting their damages as the recovery of lost benefits still constitutes the type of compensatory relief that is not recoverable under Section 502(a)(3). (Reply Br. at 10.)[7]

(Cont'd)
the Court need not decide whether or not the plaintiffs' alleged damages are sufficiently traceable to funds within the defendants' possession. *Compare Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 214 (3d Cir. 2004) (holding plaintiffs sufficiently identified the interest of wrongfully withheld funds so as to render it "readily traceable" under *Great-West); with Horvath v. Keystone Health Plan East*, 333 F.3d 450, 457 n.3 (3d Cir. 2003) (noting "there are no funds readily traceable to [plaintiff] over which a constructive trust or other equitable remedy may be imposed.").

7. Defendants also argue that plaintiffs are "barred by the Court's Order of November 10, 2004" from "recharacteriz[ing] their damages as lost pension benefits." (Reply Br. at 10.) The Court's November 10, 2004 Order, however, reserved on the issue of "whether plaintiffs can quantify or establish *any right to 'back pay' and/or equitable relief* increasing plaintiff's pension benefits." [Docket Entry No. 163] (emphasis added). It appears, therefore, plaintiffs are not barred from at least arguing their damages are equitable in nature.

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Plaintiffs rely on footnote 4 in the *Great-West* decision. In that footnote, the majority rejected Justice Ginsburg's dissenting argument that Congress has treated back pay as a type of restitution and, therefore, "equitable" for the purpose of Title VII of the Civil Rights Act of 1964. 534 U.S. at 218 n.4; *see also Strom v. Goldman Sacks & Co.*, 202 F.3d 138, 143-150 (2d Cir. 1999) (holding the recovery of life insurance proceeds that the plaintiff would have received but for defendants' breach of fiduciary duty, as with the National Labor Relations Act and Title VII, was a form of "equitable relief" under Section 502(a)(3)). For this assertion, the dissent cited *Curtis v. Loether,* 415 U.S. 189, 197 (1974) and *Teamsters v. Terry,* 494 U.S. 558, 572 (1990). The court reconciled this authority by stating, first, that "these cases do *not* say that *since* [the remedy sought] is restitutionary, it is *therefore* equitable." 534 U.S. at 218 n.4 (emphasis in original). The majority further noted that Congress had treated back pay as equitable relief in Title VII cases only in the narrow sense that it allowed back pay to be awarded "together with equitable relief." 534 U.S. at 218 n.4. (quoting 42 U.S.C. § 2000e-5(g)(1), which expressly permits a court to order "affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."). The majority stated this language can only be "understood to mean that Title VII backpay was 'specifically' made part of an equitable remedy." *Id.* The majority concluded that the remedy sought by *Great-West* — namely the reimbursement of medical benefits in the amount the beneficiary's tort recovery from a third-party -- was "a freestanding claim for

money damages" and "Title VII has nothing to do with the case." *Id.*[8]

First, the plaintiffs have not preserved their right to the "equitable decree" that they now purport to seek. Rather, with respect to damages, plaintiffs stated they will call 25 former Paradyne employees whose testimony "will correspond closely to information provided in depositions and responses to written discovery requests, the answers to interrogatories propounded by defendants . . . near the end of 2004 in particular." (*Id.* at 30.) The interrogatory responses to which the Final Pretrial Order refers reflect compensatory damages in the amount that plaintiffs claim they have lost because of defendants' conduct. (*See, e.g.*, Fabian Cert., Ex. H at 6-7.) The responses do not state that the plaintiffs seek equitable relief, but rather frame their damages solely in terms of a monetary amount. In *Mertens*, the Supreme Court excluded such compensatory damages from those recoverable as "appropriate equitable relief" under Section 503(a)(3). 508 U.S. at 257 (holding "equitable relief" under Section 502(a)(3) is limited to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, *but not compensatory damages).*" (emphasis added)); *see also Kishter*, 186 F. Supp. 2d at 438.

Second, even if plaintiffs preserved their right to appropriate equitable relief under Section 502(a)(3), footnote 4 of the *Great-West* opinion does not support their claim.

8. In *Kishter v. Principal Life Insurance Co.*, the United States District Court for the Southern District of New York recognized that "the Second Circuit's reasoning in *Strom* has been superseded by *Great-West* . . . ." 186 F. Supp. 2d at 445.

Indeed, the majority stated that the dissent's argument by analogy could only be given credence if Title VII expressly included back pay as equitable relief as a matter of statute. 534 U.S. at 218 n.4. Contrary to 42 U.S.C. § 2000e-5(g)(1), Section 502(a)(3) makes no mention of "back pay" and certainly does not specifically make it part of an equitable remedy. Plaintiffs cite no other legal authority for their argument that their claim to back pay and benefits are recoverable under Section 502(a)(3) because they are ancillary to an equitable decree. Indeed, the weight of legal authority would prohibit plaintiffs from recovering the damages they seek. *See Nicolau v. Horizon Media, Ins.*, No. 01 CIV. 0785, 2003 WL 22208356, at *3 (S.D.N.Y Sept. 23, 2003) (dismissing plaintiffs' claim for lost wages and other money damages, where plaintiffs did not seek reinstatement or any other form of equitable relief, "[b]ecause neither lost wages nor other money damages constitute an equitable remedy . . . ."), *reh'g granted* 2003 WL 22852680 (S.D.N.Y. Oct. 15, 2003), *rev'd on other grounds*, 402 F.3d 325 (2d Cir. 2005); *Pace v. Matsushita Elec. Corp. of America*, 257 F. Supp. 2d 543, 563 (E.D.N.Y. 2003) (holding the Great-West decision abrogated *Strom's* "'make-whole' remedial scheme."); *Bona v. Barasch*, No. 01-civ-2289, 2003 WL 1395932, at *12 (S.D.N.Y. March 20, 2003) (holding since the plaintiffs' "claim for monetary relief is nothing more than a claim for money damages as compensation for losses," they were barred from recovery under Section 503(a)(3)); *Kishter*, 186 F. Supp. 2d at 438. Given this authority, and the absence of authority supporting plaintiffs' recovery, the Court holds that plaintiffs' purported damages, as described in their brief and answers to interrogatories, are not recoverable under Section 502(a)(3).

Third, the plaintiffs' efforts to cloak their damages in the garb of an "equitable decree" does not advance their argument. In *Great-West,* the Supreme Court held that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." 534 U.S. at 210-11. While plaintiffs disclaim any resort to equitable relief, their purported "equitable decree" is on all fours with the type of "legal restitution" that the *Great-West* case held was not recoverable under Section 502(a)(3). Thus, plaintiffs' calling the award of back pay-type damages an equitable decree will not save their claim. *See id.* at 255 (holding "[a]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* . . ."). In short, given that the only remedies available under Section 502(a)(3) are those "typically available in equity," *Mertens,* 508 U.S. at 257, plaintiffs cannot be heard to seek the forced transfer of money.

Finally, plaintiffs distinguish their claims from those of the plan in *Great-West* in that plaintiffs seek recovery for a violation of ERISA itself, "not of a private contract." (Pl.'s Br. at 15.) Section 503(a)(3) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce *any provisions of this subchapter or terms of the plan.*" 29 U.S.C. § 1132 (emphasis added). This section makes no distinction between remedies for violation of ERISA and remedies for violation of the terms of a plan. Even if plaintiffs' argument were given credence, however, they cite no legal authority for the proposition that breach of ERISA, presumably Section 510, rather than a

breach of the terms of a plan, converts their alleged damages into an "appropriate equitable remedy" under Section 502(a)(3). Therefore, the Court finds this argument unpersuasive.

III. CONCLUSION

For all of these reasons, the Court grants defendants' motion for summary judgment. An appropriate Order will follow.

November 22, 2005

s/ Stanley R. Chesler
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 22, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler, U.S.D.J.

Civ. No. 96-3587

KURT H. EICHORN, et al.,

plaintiffs,

v.

AT&T CORP.; LUCENT TECHS. INC.; TEXAS PACIFIC GROUP; NCR CORP.; THE CIT GROUP, INC.; AND "JOHN DOE" CORPS. 1-10,

defendants.

ORDER

This matter having come before the Court on a motion by the defendant Texas Pacific Group, in which defendants Lucent Technologies, Inc., AT&T Corporation, and NCR Corporation join, pursuant to Rule 56, for summary judgment against the plaintiffs [Docket Entry Nos. 173 & 174]; and the Court having considered the arguments set forth in the parties' submissions; and for the reasons set forth in the Court's Opinion issued on the date hereof,

Appendix E

IT IS on this 22nd day of November, 2005

ORDERED that defendants' motion for summary judgment [Docket Entry Nos. 173 & 174] is hereby **GRANTED**;

IT IS FURTHER ORDERED that plaintiffs' claims for damages under ERISA Section 502 are **DISMISSED**; and

IT IS FURTHER ORDERED that all pending motions are hereby **TERMINATED**.

s/ Stanley R. Chesler
United States District Judge

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No. 07-280

FILED
OCT 29 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN, II, MICHAEL A. MCFARLAND,

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS AT&T CORPORATION, LUCENT TECHNOLOGIES INC. AND NCR CORPORATION'S BRIEF IN OPPOSITION

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Petitioners,

—v.—

AT&T CORPORATION, LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether petitioners' claim to monetarily-enhanced pension payments amounts to anything other than a request for legal relief falling outside 29 U.S.C. 1132(a)(3)'s allowance for "appropriate equitable relief?"

2. Whether petitioners, who are already receiving all benefits to which they are entitled as a consequence of their actual periods of service, may obtain under 29 U.S.C. 1132(a)(1)(B) additional monetary awards beyond what they would be entitled to under the applicable written plan terms in light of their actual service?

PARTIES BELOW AND PARENT COMPANIES

In April 2006, Lucent Technologies Inc. ("Lucent") and Alcatel SA agreed to consolidate with each other in a merger of equals. The merger closed on November 30, 2006 whereby Lucent merged with one of the subsidiaries of Alcatel SA. Lucent, a Delaware corporation, is now a wholly-owned subsidiary of Alcatel U.S.A., Inc., a Delaware Corporation. Alcatel U.S.A. Inc. is a wholly-owned indirect subsidiary of Alcatel-Lucent, S.A., a corporation organized under the laws of the Republic of France. No publicly-held corporation owns 10% or more of Alcatel-Lucent.

AT&T Corporation is wholly-owned subsidiary of AT&T Inc. No publicly-held corporation owns 10% or more of AT&T Inc.

NCR Corporation is a publicly traded corporation organized and existing under the laws of the State of Maryland. NCR Corporation does not have a parent corporation and no publicly-held corporation owns 10% or more of NCR Corporation.

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SUMMARY OF REASONS TO DENY THE PETITION

This Court has already, during recent years, considered, decided and then reiterated its position on the issue petitioners seek to have reviewed, namely the parameters of "appropriate equitable relief" under § 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). When Congress created ERISA's expansive statutory scheme, it explicitly preempted duplicative state law claims so that ERISA's chosen remedies would be the only remedies permitted. In ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), Congress chose to limit the available remedy to "equitable relief." This Court has thrice spoken on what "equitable relief" under this section allows. Petitioners request that this Court reverse those decisions, not because Congress has changed the plain and intentionally chosen statutory language already examined and interpreted by this Court, but rather because petitioners are dissatisfied with the available remedy Congress provided. This request should be denied.

Alternatively, if petitioners are not successful in having this Court reverse its previous decisions, petitioners would then have this Court rule that petitioners may resort to section § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which only provides for various relief "under the terms of a plan." Petitioners, however, fail to acknowledge that they are not seeking relief for a violation of the terms of the plan at issue and, even if they were, that the procedural history of this case bars such relief.

Petitioners' request to change the law to accommodate their facts cannot be permitted.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

AT&T Corp. is a provider of telecommunications services in the United States and abroad. In 1989, AT&T purchased Paradyne Corporation, which was subsequently re-named AT&T Paradyne Corporation ("Paradyne"). Paradyne manufactured network access products for use by AT&T, as well as other customers world-wide. Throughout the period that AT&T owned Paradyne, Paradyne's economic performance was below expectations.

In 1995, because Paradyne was not performing well economically and anticipated not to meet its targets for the year, Paradyne instituted a Force Management Plan that resulted in layoffs. As a result of Paradyne's poor performance, AT&T considered closing Paradyne's operations entirely and terminating all Paradyne employees.

Ultimately, however, AT&T elected to sell Paradyne as an operating business unit to an outside purchaser. AT&T anticipated that the sale of Paradyne would streamline its own operations, and also that Paradyne would benefit from an expanded customer base, in that it would be able to sell its products to competitors of AT&T without encountering conflicts. Accordingly, on or about October 18, 1995, AT&T publicly announced its intention to offer Paradyne for sale.

At the same time, Paradyne announced that its employees (other than those whose jobs had been identified as "at risk" due to the September downsizing) would be ineligible to apply for employment with AT&T or other affiliated entities during the sale process. This restriction, referred to throughout these proceedings as the "Preliminary Net," was designed to maintain Paradyne's workforce intact in order to maximize the attractiveness and value of the company during the sale process. The Third Circuit has previously expressly held that the Preliminary Net did not violate § 510 of ERISA, this Court declined to review that ruling and the Preliminary Net is not at issue in this lawsuit.

Shortly thereafter, AT&T announced that it intended to spin-off two subsidiaries—Lucent Technologies and NCR Corporation—as independent companies, an event known as "trivestiture." NCR Corporation was a provider of information technology solutions and hardware and is not involved in this lawsuit. Lucent's business involved the design and manufacture of networking systems, software for communications service providers, and consumer telecommunications products.

Because Paradyne's business was closely aligned with Lucent's, AT&T transferred Paradyne to Lucent as part of the trivestiture process. As customers of Paradyne's network access products, both AT&T and Lucent had an interest in Paradyne's continued viability after the sale.

In 1996, AT&T and Lucent began negotiating to sell Paradyne to Paradyne Partners, L.P., Paradyne Acquisition Corp., Rental Acquisition

Corp., Cap Acquisition Corp. and Lease Acquisition Corp. who collectively acquired Paradyne. The Texas Pacific Group ("TPG") is an investment firm that was affiliated with the entities that collectively acquired Paradyne. The entities that acquired Paradyne are collectively referred to as "TPG" for ease of reference.

During the course of the negotiations, TPG indicated that it wanted to preserve and maintain Paradyne's human resource skill base to ensure that after the sale, Paradyne could avoid significant disruptions to its operations and position itself for a successful future. Accordingly, as part of the sale, TPG demanded assurance that the Paradyne employees, whose knowledge and expertise were critical to the successful transition and continuation of Paradyne, would not be hired away by AT&T or its affiliates prior to or immediately following the sale.

In order to address this concern during negotiations, and to maximize the negotiated selling price, AT&T and Lucent agreed that, prior to the closing of the sale to TPG, neither it nor AT&T or their affiliates would hire, retain or solicit any individual who was employed by, or a consultant to, Paradyne since June 1, 1996, and whose annualized compensation was greater than $50,000 for 1996. This agreement has been referred to throughout these proceedings as the "Pre-Closing Net."

TPG also demanded an agreement that the sellers would not hire Paradyne employees for a period of 24-months after the close of the sale. AT&T and Lucent refused to accept the proposed 24-month restriction. However, the parties con-

tinued to negotiate and, ultimately, agreed to a reduced hiring restriction that precluded AT&T, Lucent or their affiliates from hiring Paradyne employees earning greater than $50,000 for a period of 245 days (eight months) after the sale, unless such employees were terminated by the new company. In arriving at this period, the negotiators took into consideration the amount of time that would be necessary for TPG to prove its capabilities to Paradyne employees, the period necessary to ensure continued quality service to Paradyne's existing customers, and the time needed to position Paradyne to acquire new customers.

On June 19, 1996, Lucent formally announced its agreement to sell all of the outstanding shares of Paradyne's capital stock to TPG. In connection with that sale, Lucent, and the acquiring parties negotiated and entered into two agreements: a Purchase Agreement, entered into as of June 18, 1996 which contained the Pre-Closing Net; and an Employee Matters Agreement, entered into as of July 31, 1996, which contained the Post-Closing Net. The sale of Paradyne closed on July 31, 1996.

B. This Litigation And Its Procedural History

The petitioners allege violations of ERISA § 510, 29 U.S.C. § 1140, which prohibits employers from discriminating against a participant in an ERISA-governed benefit plan for the purpose of interfering with his attainment of benefits. Petitioners claim that the Post-Closing Net interfered with their ability to obtain immediate

credit for their prior service if they later returned to employment with a company that participated in the Lucent pension plan, because immediate credit for past service was available only to individuals who returned to service within six months after a separation. If successful in proving liability, petitioners request defendants pay them money to bring their pensions current, and pay them money going forward, as if they were still employed by Lucent.

This litigation has a tortured history and has languished for years. Petitioners plea for a grant of certiorari fails to provide facts that are dispositive of several issues petitioners raise. As such, an outline of certain key procedural dates is necessary.

7/24/96: Plaintiffs' first file complaints seeking "damages" as a result of alleged interference with their ERISA-protected pension and severance benefits.

8/23/99: District Court grants defendants' motion for summary judgment filed after thirty-six months of discovery.

4/23/01: The Third Circuit affirms in part and reverses in part, and additional discovery ensues thereafter. (*Eichorn v. AT&T*, 248 F.3d 131 (3d Cir. 2001)).

12/4/02: The District Court extends discovery and orders that it will close on January 31, 2003. The order also states that no further discovery will be conducted except by motion and for good cause shown.

1/31/03: Discovery closes with no motion to extend the discovery period.

5/27/03: For the first time and seven years after the action was filed, plaintiffs provide "damages" disclosures required by Fed. R. Civ. P. 26 mandatory disclosure requirements. In support of their benefit calculations, plaintiffs proffer the testimony of Stephen J. Crowley, a chemist by training, an admitted non-expert as to benefits or damages calculations and plaintiffs' counsel's son.

6/24/03: Almost seven years after commencing the litigation, plaintiffs move to have the proposed class certified.

10/21/03: Plaintiffs' motion for class certification is denied.

After denying class certification, the District Court turned to damages issues. Petitioners' motion to have their damage calculations even considered in this case was granted after extensive oral argument where petitioners represented that they wanted to rely upon Stephen Crowley's calculations. Petitioners were warned that if they moved forward with the calculations, they would "live or die" with them. Even in the face of this warning, petitioners chose not to retain a qualified expert at that time.

After allowing petitioners' chosen damages witness, Mr. Crowley, to produce his calculations (based in part on information gathered from the Foundation for Infinite Survival, Inc. website), to be examined at deposition, and for related dis-

covery to occur, the District Court addressed defendants' motion to strike such evidence and testimony. After further extensive argument, the District Court entered a November 10, 2004 Order stating that Mr. Crowley's reports and calculations were barred from admission and Mr. Crowley was precluded from testifying as a witness at trial. The Order also denied petitioners leave to add expert witnesses or submit calculations, reports or testimony from such experts.[1] The Order also states, in pertinent part:

> ORDERED that the Court does not reach the issue of whether plaintiffs can quantify or establish any right to **"back pay" and/or equitable relief** increasing plaintiff's [sic] pension benefits and reserves such issue for resolution at or before trial; and it is further
>
> ORDERED that the parties are directed to confer with Magistrate Judge Hughes to schedule limited discovery of **remaining damages issues** and preparation of a final pretrial order; . . . (emphasis added).

Magistrate Judge Hughes allowed petitioners to serve written discovery requests by December 10, 2004 "concerning plaintiffs' claims for damages and other forms of relief **that have not been precluded by the Court's November 10, 2004 Order**." (emphasis added).

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[1] This issue was appealed to and affirmed by the Third Circuit, but has not been raised in Petitioners' request for certiorari.

Pursuant to this order, petitioners issued a variety of discovery requests, most of which defendants refused to answer as outside the scope of the limited discovery permitted under the November 10, 2004 Order. Petitioners requested that the Magistrate Judge compel the defendants to produce the requested discovery, which the Magistrate Judge denied. His order stated that the discovery served by petitioners "far exceeds the parameters of Fed. R. Civ. P. 26(b)(1), given the limited discovery allowed" by the Court as indicated by colloquy at argument on November 1, 2004 and the Order filed November 10, 2004 and that the documents produced already were sufficient and that petitioners had had more than ample time to conduct discovery over the then nine-year life of this case. Petitioners appealed this May 16, 2005 order to the District Court.

On July 22, 2005, the District Court affirmed the May 16, 2005 Order. The District Court noted that it had "**wholly rejected plaintiffs' position that it was entitled to any future pension benefits**, and limited plaintiffs' remaining claims, if any, to back pay, provided that each individual plaintiff could actually prove entitlement to same with regard to any specific position allegedly denied." (emphasis added). The District Court further noted that, contrary to petitioners' argument, it did not intend to re-open discovery and that if it "had known [petitioners] would engage in such a misuse of the opportunity to conduct the limited discovery intended, it would not have granted leave for any."

Subsequently, TPG moved for summary judgment, joined by the other defendants. The District Court granted that motion and dismissed the case. Pet. App. D, 41a-70a. Petitioners appealed to the Third Circuit. In a reported decision, the Third Circuit affirmed the District Court's ruling. Pet. App. A, 1a-29a. Petitioners requested rehearing and rehearing *en banc*, both of which were denied. Judge Ambro filed a concurring opinion. App. B, 32a-40a. The Petition followed.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. PETITIONERS' DISSATISFACTION WITH THE ESTABLISHED INTERPRETATION OF THE PLAIN LANGUAGE OF ERISA § 502(a)(3) DOES NOT CREATE AN ISSUE WORTHY OF A GRANT OF CERTIORARI.

A. This Court's Opinions In *Mertens* and *Great-West* Have Already Interpreted Correctly The Language Congress Chose When Enacting The ERISA Enforcement Provisions And Thus Resolved Already Any Claimed Conflicts.

This Court has, already, correctly read and interpreted the plain statutory language of ERISA § 502(a)(3). In *Mertens*, this Court had occasion to examine § 502(a)(3), which states that a plan beneficiary, participant, or fiduciary may bring a civil action:

> (A) *to enjoin* any act or practice which violates any provision of [ERISA] or the terms of the plan or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan. . .

Mertens v. Hewitt Assoc., 508 U.S. 248, 253 (1993) (emphasis added). After examining the phrase "other appropriate relief," this Court found that it would only encompass those damages which were *typically* available in equity. *See id.* at 256. Such relief did not include compensatory or legal damages. *See id.*

In discussing Congress' choice of the words "equitable relief," it was noted that it is not acceptable to read a statute so as to render a modifier superfluous or to deprive it of all meaning when various sections of ERISA also utilize terms such as "remedial" relief and "legal" relief. *See id.* at 258-59. In so finding, this Court acknowledged the "tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs." *Id.* at 262-63.

In 2002, this Court underscored its ruling in *Mertens*. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the ERISA covered plan sought to enforce a reimbursement provision against its insured to recover monies she received from a third party related to an automobile accident. *See id.* at 207. The issue to be decided was whether such relief was permissible under § 502(a)(3) as equitable relief. *See id.* at 206.

Because ERISA is a "comprehensive and reticulated statute" and "the product of a decade of congressional study of the Nation's private employee benefits system," *id.* at 209, this Court was appropriately reluctant to tamper with the careful deliberation used in ERISA's creation of an enforcement scheme. Consequently, the Court refused to create remedies not explicitly authorized by the text. *See id.*

After examining the *Great-West* petitioners' unpersuasive arguments to the contrary, the Court found that the requested relief was not authorized by § 502(a)(3). *See id.* at 209-221. The relief was essentially a request for money damages, relief unavailable under this section of ERISA. *See id.* at 209-212. Moreover, even if the relief was characterized as "restitution," not all restitution was typically available in equity. *See id.* at 212-216. Equitable restitution refers to instances when a plaintiff is seeking to restore particular funds or property in the defendant's possession, not to impose personal liability on a party or to enforce some amorphous right to restitution *at law*. *See id.* at 214.

No matter how these petitioners attempt to contort their damage claims, the relief they request is clearly not equitable. If this Court were to employ petitioners' logic to its conclusion, all claims in all cases would be considered equitable in nature, an approach this Court has already specifically rejected because "'[e]quitable' relief must mean *something* less than *all* relief." *Great-West*, 534 U.S. at 209 (*citing Mertens*, 508 U.S. at 258, n. 8). Here, no matter how much petitioners "dance around the word,

what [they] seek is nothing other than compensatory damages." *Mertens*, 508 U.S. at 250.

This Court recently reaffirmed its *Mertens* and *Great-West* opinions. *See Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.Ct. 1869, 1873 (2006). After noting that "[t]his is not the first time we have had occasion to clarify the scope of the remedial power conferred on district courts by § 502(a)(3)(B)," this Court recounted and relied upon its previous relevant rulings. *See id.* After reminding the bar of the Congressional limitations of § 502(a)(3), this Court held that a suit by an insurer to recover funds pursuant to a reimbursement provision was permissible under § 502(a)(3) only when it requested specifically identifiable funds and was therefore equitable restitution. *See id.* at 1875-77.

Petitioners have provided no compelling basis to support their position that this Court's well-reasoned and logical statutory interpretation in *Mertens* and *Great-West*, just recently reaffirmed in *Sereboff*, should now be reversed. ERISA is "an enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests - not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Petitioners displeasure with the remedies Congress chose is no reason for the Court to resort to legislating.

B. The Third Circuit's Decision In *Eichorn* Is Consistent With Those Of Other Circuits And There Is No Inter-Circuit Conflict.

Petitioners cite only a handful of cases to support their contention that a significant inter-circuit conflict exists.[2] When each of these few cases is reviewed and analyzed, however, it becomes evident that the conflict is a product of petitioners' imagination rather than a legal reality.

First, petitioners concede, as they must, that a recently-decided Sixth Circuit unreported case is in harmony with this Court's *Mertens/Great-West* decisions. *Alexander v. Bosch Auto Sys.*, 2007 U.S. App. LEXIS 11694 (6th Cir. 2007). In *Alexander*, plaintiff accused defendant plant of intentionally timing the plant closure so as to exclude plaintiffs from the offered plant closure benefits. *See id.* at *3-7. Plaintiffs sued alleging, *inter alia*, unlawful interference with benefits pursuant to § 510. *See id.* at *7. As a remedy, plaintiffs demanded the plant closure benefits to be reinstated. *See id.* at *7-8.

At oral argument, the *Alexander* defendants conceded liability but argued that the remedy sought, reinstatement in the plant's closure benefit plan, did not qualify as "other appropriate relief" under § 502(a)(3). After analyzing the issue under *Great-West*, the Sixth Circuit found that the requested remedy was not equitable and

[2] Petitioners also claim *Enniss v. Enniss*, 198 Fed. Appx. 594 (9th Cir. 2006), and *Bowen v. Massachusetts*, 487 U.S. 879 (1988), present conflicts. These cases do not do so and are addressed in Section IC below.

therefore not available. *See id.* at *25-30. In following *Great-West*, the Court of Appeals noted that to allow plaintiff's requested relief would be a "contortion of remedies law to characterize [it] as equitable restitution." *Id.* at *29. While the Court of Appeals stated it was "not calloused" to the plaintiffs situation, it recognized that plaintiffs might have had other remedies which they failed to pursue. *See id.* at 32. Moreover, the court noted that Congress provided the limited remedies and "did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at *32-33 (*citing Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985); *see Dollar Sav. Bank v. United States*, 86 U.S. 227, 233, 22 L. Ed. 80 (1873)). As such, "if there is to be any exception to or expansion of these remedies, it must come from Congress, not from this bench." *Id.* (*citing Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1260 (10th Cir. 2004) (quoting *Guidry v. Sheet Metal Workers Nat'l Pension*, 493 U.S. 365, 376, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990)).

Petitioners' characterization of *Administrative Comm. of the Wal-Mart Assoc. Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir 2004), as conflicting with this Court's precedent is inaccurate.[3] *Willard* involved a suit seeking to

[3] The discussions of petitioners' improper characterizations of case law, as well as misrepresentations or omissions of relevant facts related to the underlying litigation are presented to the Court pursuant to Sup. Ct. R. 15(2) requiring opposition to address any perceived misstatement of fact or law. Given space constraints, however, Respondents are unable to address each and every misstatement.

enforce a reimbursement provision in plaintiff's benefit plan, similar to the *Great-West* case. *See id.* at 1120-21. The *Willard* court recounted the *Great-West* holding and applying this Court's definition of equitable restitution, found that in applying *Great-West* there will be some "direct or indirect transfer of money and we cannot read the statute to proscribe all forms of relief." *Id.* at 1125. This is the language petitioners cite in support of their claim that *Willard* conflicts with *Great-West*. In *Willard*, however, the Tenth Circuit found that the requested relief met the *Great-West* inspired three-part test that controls whether the requested restitution was equitable in nature. *See id.* 1121-1125. Since that test was satisfied, the Tenth Circuit pronounced that *Willard* involved "exactly the type of equitable restitution claim the Court had in mind in *Great-West*." *Id.* at 1125.

In their attempt to present a conflict, petitioners' claim that *Eichorn* would have been decided differently if one applied the Tenth Circuit's decision in *Millsap*. Such a contention is wrong. In *Millsap*, plaintiffs settled their claims for lost pension and health care benefits. *Millsap*, 368 F.3d at 1246. The only issue left in the case was whether back pay qualified as equitable relief under § 502(a)(3). *See id.* at 1249. After reviewing *Mertens* and *Great-West*, the court "easily" concluded that the back pay was compensatory in nature and therefore prohibited. *See id.* at 1254. Petitioners cited language, that § 510's "purpose is to protect the participants *in employee benefit plans*," *id.* at 1259 (emphasis in original), is taken wholly out of context. That

quote refers to the difference between ERISA and the National Labor Relations Act and Title VII, the latter two being make-whole statutes and ERISA protecting participants in employee benefit plans. *See id.* (discussing the distinction between Title VII back pay and § 502(a)(3) remedies).

Petitioners again misstate the holding in their discussion of *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004). The *Mathews* court found that an injunction "instating" plaintiffs into a severance package was equitable relief. *See id.* at 1186. In that case, the court stated that an injunction to modify the plan records was not on its face an award of monetary damages. *See id.* Moreover, the court found that the relief granted was also equitable in substance because all parties agreed that but for the termination, the plaintiffs would have been eligible for the benefits. *See id.*[4]

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[4] Perhaps realizing that the evidence to support a conflict is slight, petitioners resort to a few cases decided before *Great-West*, but that allegedly "conflict in principle" with this Court's holding. Pet. at 20. For instance, petitioners claim that *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), demonstrates a way to compensate the petitioners without running afoul of *Great-West*. But petitioners citations to dicta stating that money damages can be equitable relief do not demonstrate that it would conflict with *Great-West*. In fact, *Great-West* acknowledges that money can be provided by equitable relief. *Great-West*, 534 U.S. at 214 (explaining that equitable restitution referred to instances when a plaintiff was seeking to restore particular funds or property in the defendants possession, not to impose personal liability on a party).

As the cases cited by petitioner do not represent a inter-circuit conflict, certiorari would not be warranted.

C. The Third Circuit's *Eichorn* Decision Does Not Conflict With *Varity* and *Bowen* And Like Authority.

Petitioners present this Court with a red herring in their argument that even if awarding enhanced past pension benefits is determined to be a legal remedy, awarding enhanced future pension benefits would be an equitable one. First, petitioners request that this Court allow them to pursue future pension benefits. Even if this Court so held, this would still not provide petitioners a remedy as they have been precluded from seeking such relief by the lower court and have not appealed that ruling. Second, this argument ignores *Great-West's* pronouncement that § 502(a)(3) only permits those damages which were *typically* available in equity. *See id.* at 256. Petitioners provide no authority to support their claim that future payments are such a remedy.

The procedural posture of this case is dispositive of this issue. Petitioners have no damage expert and were denied leave to seek a replacement expert. As such, the District Court Judge found that petitioners were only able to pursue back pay and/or equitable remedies. The Third Circuit affirmed these rulings and they are not part of this petition. Petitioners' request that this Court address the question of whether the award of future pension benefits is equitable or legal runs afoul of Article III's standing requirements.

This Court has held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 168-169 (2000) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Therefore, to even be permitted to present an issue:

> a complaining party must show 'an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). A ruling that does not provide any relief to the prevailing party ignores the duty of federal courts " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), *quoting Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895).

Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206, 1209 (1984). A successful ruling on the availability of future pension benefits would provide no redress to these petitioners, as they have already been precluded from seeking such relief below for rea-

sons that will remain unchanged whether by the result here or an opinion on this an abstract legal question.

Were this Court to address the issue despite petitioners' inability to achieve redress, *Varity*, *Bowen* and the like do not support plaintiff's argument.[5]

Any alleged reliance on *Varity* may be quickly dispelled. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). First, the *Varity* Court did not rule on whether the relief sought was equitable because the parties stipulated that it was. *See Eichorn v. AT&T et al.*, 484 F.3d 644, 656, *reh'g en banc denied*, 489 F.3d 590 (3d Cir. 2007) (*citing Varity* and quoting that "Varity *concedes* that the plaintiffs satisfy most of this provision's requirements, namely, that the plaintiffs are plan 'participants' or 'beneficiaries,' *and that they are suing for 'equitable' relief to 'redress' a violation of § 404(a),* which is a 'provision of this title.'" (emphasis in *Eichorn*); *see also Great-West*, 534 U.S. at 221 n. 5 (stating it was undisputed in *Varity* that the relief sought was equitable).

Second, the *Varity* plaintiffs sought to be reinstated in the pension plan and receive pension credit for work they actually had done for the company. The plaintiffs in *Varity* "were deceived into transferring from one subsidiary to another

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[5] No extended discussion of *Enniss v. Enniss*, 198 Fed. Appx. 594 (9th Cir. 2006), an unpublished case mentioned by petitioners is warranted. The single page *Enniss* decision alludes in one paragraph to the equitable nature of the injunction provided in that case without explanation of the facts that led to that injunction or the required relief. *See id.* at *1. As such, it adds little to this discussion.

within the same company, and thus the relief in that case was measurable according to the defendants' gain, rather than the plaintiffs' loss." *Eichorn*, 484 F.3d at 656 (citations omitted). The petitioners here seek benefits for work they did not do. As such, the *Eichorn* court noted that:

> The remedy they seek is thus akin to "back pay," which is not an equitable remedy within the meaning of the statute. *Great-West*, 534 U.S. at 218 n.4, 122 S. Ct. 708; *see also Millsap*, 368 F.3d at 1253 ("[P]aying backpay damages is like paying an extra worker who never came to work." (*quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 229, 102 S. Ct. 3057, 73 L.Ed.2d 721 (1982)); *id.* at 1254 ("Plaintiffs' proposed method of calculating their backpay award is based on each individual class member's loss rather than Defendant's gain . . . [and] is thus in the nature of compensatory damages."); 2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) at 226 (2d ed. 1993) ("Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due, for example . . . [s]o, while reinstatement is clearly equitable as a form of injunctive relief, back pay seems to be just as clearly legal.") (footnotes omitted).

Bowen v. Massachusetts, 487 U.S. 879 (1988), is similarly inapposite. In *Bowen*, this Court

addressed the federal courts' jurisdiction to review a final Health and Human Service ("HHS") order refusing to reimburse a state for a category of expenditures under its Medicaid program. The statute disallowed review in cases seeking "money damages." *See id.* at 891-901. Aside from the vast factual differences that make *Bowen* readily distinguishable, the prospective relief sought there was equitable because the State was not seeking compensatory damages, rather it was seeking to enforce a statute requiring that HHS "shall pay" certain sums of money. *See id.* at 900-01. The underlying case, one to enforce the statute itself, involved the payment of money only in the most minimal sense, i.e., the equitable recovery of specific monies owed to the party. *See id.* at 893. The state was not seeking compensation for its losses, rather it was seeking to remedy the wrongful withholding of those funds. *See id.* at 901.[6] This is fundamentally different than asking a court to find that respondents interfered with petitioners' benefits rights and to order respondents to pay money to compensate petitioners for that loss.

This Court's decision in *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2044), *cert. denied*, 546 U.S. 812 (2005), is also plainly not in conflict with *Eichorn*. In *Callery*, the Tenth Circuit denied plaintiff's request to collect benefits from her ex-husband's life insur-

[6] Petitioners' reliance on Justice Scalia's dissent is similarly unavailing. Justice Scalia noted that he agreed with the majority that the actions were not barred "insofar as they seek injunctive or declaratory relief with prospective effect." *Id.* at 921-22 (emphasis added).

ance policy as such relief would constitute legal damages not available under ERISA § 502(a)(3). *See id.* at 402. The *Callery* court discussed and followed the dictates of *Mertens* and *Great-West*. *See id.* at 405. Moreover, petitioners representation that the *Callery* court "held" that court ordered changes to affect future payments was clearly equitable is misleading. *See* Pet. at 22. Rather, in dismissing the plaintiff's reliance on *Downie v. Indep. Driver Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991), the *Callery* court noted that the *Downie* court used its "equitable powers to restore the parties to their original positions in order to affect the beneficiary ability to receive future payments." *Id.* at 407. That order, requiring the plaintiff to pay restitution so that the could receive restoration of his benefits, was what the *Callery* court discussed as qualifying as equitable relief. *See id.* at 407. As such, *Callery* did not "hold" that an ability to receive future payments was clearly equitable.

D. Dissatisfaction Expressed By Judicial Or Academic Commentators With ERISA's Statutory Language Should Not Be Mistaken For A Present Conflict Among The Circuits.

Judge Ambro's concurrence in *Eichorn II* underscores that the Third Circuit properly interpreted the relevant authority, namely *Great-West*, *Mertens*, and *Varity*. *Eichorn*, 489 F.3d 590, 591 (3d Cir. 2007) ("*Eichorn II*"). Judge Ambro acknowledges that "under this rubric, Eichorn's request for an adjustment of pension records that would create a payment obligation is clearly

unavailable." *Id.* (emphasis added). He continues on, however, to detail his dissatisfaction with the remedy ERISA provides and urges Congress or this Court to revisit the issue. *See id.* As is detailed in section II, if any revision to the statute is desired, it must come from Congress. The other authority cited by petitioners actually support this proposition. *See Millsap*, 368 F.3d at 1261 (stating that while not unsympathetic, there were other means to seek the legal recovery requested and if exception to § 502(a)(3)'s plan terms were to be permitted, "it is for Congress to undertake that task" (*citing Guidry*, 493 U.S. at 376; *Alexander*, 2007 U.S. App. LEXIS 11694, 19-20 (stating that while not calloused to plaintiff's situation, other remedies existed and change, if any, of ERISA's provisions must come from Congress (citing *Millsap*)); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (J. Ginsberg, concurring) (reiterating her dissatisfaction with *Mertens*, *Great-West*, and its ilk and discussing her ongoing dissatisfaction with those holdings and the ERISA remedial scheme); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453-467 (3d Cir. 2003) (Becker, C.J., concurring) (setting forth his displeasure with the ERISA preemption requirements and its remedial scheme) (Ambro, J., concurring) (same).

It is indisputable that consensus rarely, if ever, will be attained over a particular statute or remedy. Petitioners present nothing more than that disagreement, which is insufficient to overturn this Court's previous decisions. Petitioners' efforts to spin judicial discord from judicial dis-

satisfaction fail and the petition for certiorari should be denied.

II. WHILE ERISA UNDOUBTEDLY RELATES GENERALLY TO ISSUES OF PUBLIC IMPORTANCE, THE PARTICULAR ISSUES ALLEGED IN THE PRESENT PETITION ARE ONES ONLY CONGRESS CAN ADDRESS.

This Court has noted that ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefits system." *Mertens*, 508 U.S. at 251. Section 502(a)(3) is but one of the "six carefully integrated civil enforcement provisions" of ERISA. *Id.* at 252. Given this comprehensive framework, this Court has "been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Great-West*, 534 U.S. at 209 (citing *Russell*, 473 U.S. at 147 (1985)); *see also Callery*, 392 F.3d at 407 (noting that the "limitation of remedy is a product of the statute and we must enforce it.").

Further, Congress' "detailed provisions of § 502(a). . . represents a careful balancing of the need for promote and fair claim settlement procedures against the public interest in encouraging the formulation of employee benefits." *Davila*, 542 U.S. at 208 (addressing the preemptive reach of ERISA) (*citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)). While Justice Ginsberg concurred in *Davila* and utilized the opportunity to reiterate her dissatisfaction with *Mertens*, *Great-West*, and related cases, that con-

currence simply registered an ongoing disagreement with those holdings.

Moreover, while ERISA was undoubtedly enacted with underlying public interests in mind, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West*, 534 U.S. at 220. As the same ERISA section also provides for relief without reference to either legal or equitable, this Court did "not attempt to adjust the 'carefully crafted and detailed enforcement scheme' embodied in the text that Congress has adopted." *Id.* at 221. As the Fourth Circuit aptly observed:

> Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of "ensuring fair and prompt enforcement of rights under a plan" on the one hand and "encourag [ing] . . . the creation of such plans" on the other. *Davila*, 542 U.S. at 215, 124 S.Ct. 2488. (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this—where there was no unjust enrichment, unlawful possession, or self-dealing—would seriously deter plan formation and the service of qualified individuals and institutions

as fiduciaries. *Compare, e.g., Mertens*, 508 U.S. at 262-63, 113 S.Ct. 2063 (discussing negative effects of expansive ERISA liability).

LaRue v. DeWolff, Oberg & Assoc., Inc., 450 F.3d 570, 577-78 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (2007).[7] The change petitioners advocate, if ERISA were to change at all, must come from Congress.

III. THIS CASE IS DEMONSTRABLY NOT THE PROPER VEHICLE TO ADDRESS INTERTWINING MONETARY DAMAGES AND EQUITABLE RELIEF UNDER § 502(A)(3), AND ESPECIALLY NOT UNDER § 502(A)(1)(B).

Petitioners state that one question presented to this Court is whether § 502(a)(1)(B) provides a remedy if § 502(a)(3) precludes a remedy because of the "element of monetary damages." Therefore, petitioners claim that this case provides an appropriate vehicle to for this Court to address whether § 502(a)(1)(B) may be utilized in § 510 cases. Pet. at 12-13, n. 1 & 2. In crafting this argument, petitioners avoid addressing the central issue that has foreclosed them from seeking relief under this section.

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[7] Petitioners also request that the Court seek the Solicitor General's opinion in an effort to marshal other, similarly dissatisfied parties to provide a veneer of support for their position. But such opinions do nothing to assist the Court in deciding these issues. As discussed above, a change in the ERISA scheme can come from only one source, Congress, the only entity that has the ability to effectuate any change to this sweeping and comprehensive statutory design.

The *Eichorn* court found that the plain statutory language of Section 502(a)(1)(B) provides that "A civil action may be brought—(1) by a participant or beneficiary— . . . (B) to recover benefits due to him **under the terms of his plan**, to enforce his rights **under the terms of the plan**, or to clarify his rights to future benefits **under the terms of the plan**." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). There was no question that the *Eichorn* plaintiffs were alleging interference with the plan, not a breach of its terms and therefore ERISA § 502(a)(1)(B) did not provide a remedy. *See Eichorn*, 484 F.3d at 651-54; *see also Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143 (E.D.N.Y. 1996) (finding a plaintiff could not seek relief under § 502(a)(1)(B) because he was alleging interference, not a failure to abide by the terms of the plan) (*citing Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992)); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2nd Cir. 1999), *abrogated on other grounds by Great-West*, 534 U.S. at 214-15 (holding that plaintiff's claim for monies from an insurance policy for her ex-husband that required the insured be a spouse was not viable under § 502(a)(1)(B) as that section required a contractual right to benefits "due to him under the plan."); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir. 1990) (stating that where a plaintiff alleged both he was wrongfully terminated to stop his vesting and he was entitled to his benefits under the plan up until his termination, he stated both § 502(a)(3) and 502(a)(1)(B) claims).

The remedies available under ERISA § 502(a)(1)(B) are not at issue in this case because petitioners cannot proceed under this section as their claims plainly do not arise out of a violation of the plan itself. The issue of whether the section allows for equitable and/or legal relief is wholly irrelevant to this finding. The *Eichorn* court's description of petitioners' failed theory illuminates its problem, stating that:

> The plaintiffs' principal argument appears to be that, although they have not alleged that the defendants violated the terms of the benefits plan, the District Court could nevertheless effectively create a violation of the plan through a decree ordering Lucent to adjust its pension records to treat the plaintiffs as if they had remained at Lucent until retirement. The plaintiffs contend that such an order would result in an immediate obligation on the part of the defendants to pay the plaintiffs money that was rendered "past due" by operation of the court's decree, thus entitling the plaintiffs to seek relief under subsection (a)(1)(B). This bootstrap approach finds no support in the decisions the plaintiffs cite.

Eichorn, 484 F.3d at 653.

In an attempt to distract the Court from these petitioners' inability to utilize § 502(a)(1)(B), petitioners cite several cases that allegedly support their arguments. A review of this authority,

however, reveals that it accomplishes no such goal.

In *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587 (6th Cir. 2004), plaintiff sought to receive benefits above and beyond what the terms of the plan would have allowed under § 502(a)(3). *See id.* at 590. The court vacated the award from the lower court as impermissible because it was not appropriate equitable relief under § 502(a)(3). *See id.* at 592-93. Contrary to petitioners description, rather than imply a cause of action may have been viable under that section, the court noted that "[u]nder the language of the plan, Mr. Crosby was entitled to less than he had already been paid—a circumstance that explains the decision not to invoke § 502(a)(1)(B)." *Id.* at 591.

Petitioners misleading depiction of *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir. 1990) ("*Cox II*") necessitates a short discussion. Petitioners claim that *Cox* supports their assertion that they are entitled to relief under § 502(a)(1)(B) because the *Cox* court found that an action that fits within the second clause is "patently equitable in nature." Pet. at 14. First, *Cox II* and its predecessor examined the issue of whether an ERISA claim warranted a jury trial. *Eichorn*, 484 F.3d at 654. Moreover, while the above is a technically accurate quote, in that dicta the court was discussing the fact that a plan must incorporate an appeal process and a suit to enforce that right would fit into the sec-

ond clause and is "patently equitable in nature." *See id.* at 650.[8]

Moreover *Great-West* tacitly acknowledges that a claim not arising out of the contract must proceed using the catch-all § 502(a)(3). Using petitioners' logic, rather than established authority, any cause of action related to a pension plan would fall under both § 502(a)(1)(B) and § 502(a)(3), making the differences between those provisions meaningless. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *U.S. v. Kramer*, 757 F. Supp. 397, 419 (D.N.J. 1991). Petitioners resort to an ERISA section that, on its face, cannot provide them relief certainly does not merit a grant certiorari.

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[8] As for the claim that *Cox II* supports petitioners claim that even in the face of clear statutory language requiring a claim under the terms of the plan to utilize § 502(a)(1)(B), it should provide a remedy for interference claims, the *Eichorn* court noted that:

> We did not undertake any analysis of whether the district court had correctly held that a claim under § 510 could be enforced under § 502(a)(1)(B). The only comment we made that appears directly relevant to this issue undermines, rather than supports the plaintiffs' position in this case. In disposing of Cox's arguments, we stated, "[t]o the extent that Cox seeks compensatory damages for tortious interference, that claim does not fall within section 502(a)(1)(B)."

Eichorn, 484 F.3d at 654.

IV. THE INSTANT MATTER PRESENTS FUNDAMENTALLY DIFFERENT ISSUES THAN *LaRUE V. DEWOLFF, OBERG & ASSOCIATES, INC.*, 127 S.Ct. 2391 (2007) AND TANDEM CONSIDERATION IS NOT WARRANTED.

On June 18, 2007, this Court granted certiorari in *LaRue v. DeWolff, Oberg & Assoc., Inc.*, 450 F.3d 570 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (2007). There, petitioner claims he lost value in his pension plan because the fiduciary failed to follow his investment instructions. Petitioner alleged that he lost approximately $150,000 from this alleged breach and sought to recover that amount. The thrust of petitioner's claim in *LaRue* is that he should be permitted to utilize § 502(a)(2) to recover personal losses when that section only authorizes actions that inure to the benefit of the plan. *See id.* at 573. (*citing Russell*, which states that "[r]ecovery under this subsection must 'inure[ ] to the benefit of the plan *as a whole*,;' not to particular persons with rights under the plan."). The *LaRue* petitioners further argued that if relief is unavailable under § 502(a)(2), then relief should be available under § 502(a)(3). The Fourth Circuit, following *Great-West*, found that since there were no specifically identifiably funds, the relief petitioner sought was not equitable restitution, rather it was for "make-whole" relief not permitted by that section. *See id.* at 576.

The *LaRue* result, to the extent at all relevant, is consistent with the Third Circuit's decision here, and thus provides no basis for contending any conflict between the Third and Fourth Cir-

cuits exists. Moreover, this Court's grant of certiorari in *LaRue* appears solely, or at least principally, driven by a desire to address the questions the *LaRue* petitioners raised as 29 U.S.C. § 1132(a)(2), a provision not at issue here in *Eichorn*. As the Court has addressed, as recently at 2006, the general issues arising in this case under 29 U.S.C. § 1132 (a)(3), *see Sereboff*, 126 S.Ct. 1869, it is clear that the much narrower, more specific "surcharge" question presented by *LaRue* under subsection (a)(3) provides no reason to take any action here other than to deny certiorari. *See LaRue's Questions Presented, No. 06-856.*

CONCLUSION

Respondents Lucent Technologies Inc. (now known as Alcatel-Lucent), AT&T Corporation and NCR Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 07-280

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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN, II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULIX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TEXAS PACIFIC GROUP

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Third Circuit's opinion in *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), does not conflict with either a decision of this Court or of another Court of Appeals.

II. Whether the interplay of Sections 510 and 502(a)(1)(B) of ERISA implicates an important federal question that has not already been settled by this Court.

III. Whether the lower courts' decisions have the effect of nullifying all claims for relief in a properly plead and proven complaint under § 510 of ERISA.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Texas Pacific Group, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Respondent Texas Pacific Group ("TPG") submits this brief in opposition to Petitioners' application for a Writ of Certiorari. Petitioners are former employees of AT&T Paradyne, which was sold by Respondent Lucent Technologies Inc. ("Lucent") to affiliates of TPG. When the sale closed, Petitioners ceased participating in Lucent's pension plan and began participating in the new Paradyne Corporation's pension plan.

Petitioners do not allege any breach of the terms of the Lucent pension plan. Nor do they allege that Respondents breached any fiduciary duty. Petitioners admit that they did not lose even a single cent of their vested pension benefits in the Lucent pension plan. Nevertheless, Petitioners allege that no-hire restrictions in place during the course of the sale and for a 245-day period following the closing "interfered" with their ability to bridge their terms of service under the Lucent pension plan in the event that they were to return to employment with Lucent. At least three of the Petitioners were re-employed by Lucent and bridged their terms of service. The remaining Petitioners were never re-employed by Lucent, yet they seek money damages, under § 510 of ERISA, 29 U.S.C. § 1140, as if they had actually worked for Lucent without interruption.

The District Court properly dismissed Petitioners' complaints because the relief that they seek, *i.e.*, money damages, cannot be awarded under the relevant enforcement provision of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3). The District Court's decision and the Third Circuit's affirmance of that decision were both premised on this Court's binding opinions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), which collectively hold that § 502(a)(3) permits awards of equitable relief *only*. Because the Petitioners failed to plead a single form of equitable relief recognized at common law, the lower courts' correctly held they had no basis for recovery under § 502(a)(3).

Petitioners have not demonstrated any compelling reasons in accordance with Supreme Court Rule 10 to justify granting their Petition. First, Petitioners have not established that the rulings by the District Court and the Third Circuit conflict with any decision of this Court. Second, Petitioners have not established that the lower court rulings conflict with any decision of another Court of Appeals. Third, the lower court rulings do not implicate an important question of federal law that has not been, but should be, addressed by this Court. Finally, the lower courts' decisions do not have the effect of nullifying all claims for relief under § 510. The typical § 510 case arises when an employer wrongfully discharges an employee to prevent his or her pension rights from vesting, and the typical relief accorded under § 502(a)(3) is reinstatement to employment plus any ancillary monetary relief. Here, Petitioners were not wrongfully discharged; they have not lost any vested pension benefits; and they are not seeking reinstatement to employment. Petitioners are not the type of claimants contemplated by § 510.

The fact that Petitioners have no remedy under § 510 does not render the statute nugatory. As this Court held in *Mertens*, ERISA was intended to balance competing employer/employee interests; therefore, not all potential plaintiffs are provided with a remedy under ERISA. It is understood and accepted that certain ERISA plaintiffs can be left without a remedy. If an exception to that result is to be made, Congress must make it, not this Court. The Petition should be denied.

STATEMENT OF THE CASE

In 1989, AT&T Corp. ("AT&T) acquired Paradyne Corporation, which thereafter became known as AT&T Paradyne. (Pet. App. at 42a.) The employees of AT&T Paradyne immediately became eligible to participate in AT&T's defined benefit pension plan (the "AT&T Pension Plan"). (*Id.*) The AT&T Pension Plan contained a six-month "bridging" provision. (*Id.*) Under the terms of that provision, if an employee left his or her employment with AT&T or an AT&T-affiliated company only to return to a position within the AT&T family of companies

within six months, that employee could immediately "bridge" his or her pension benefits as if no interruption in service had occurred. (*Id.*) If, however, an employee returned after that initial six-month period, he or she would have to work for AT&T or an AT&T-affiliated company for five years before bridging would occur. (*Id.*) This bridging provision did not create or confer any pension rights; rather, it set forth contract terms from which a plan participant might benefit in the future if certain conditions precedent were met.

During the corporate reorganization that resulted in the spin-off of Lucent and NCR Corporation from AT&T (the "Trivestiture"), control of AT&T Paradyne was transferred to Lucent. (Pet. App. at 43a.) As a result of the transfer, the pensions of the AT&T Paradyne employees became part of the Lucent defined benefit pension plan (the "Lucent Pension Plan"). The provisions of the Lucent Pension Plan were substantially the same as those of the AT&T Pension Plan, except that the Lucent Pension Plan was later amended to reduce the bridging period from five years to three years.

In October 1995, before the Trivestiture was completed, AT&T announced that it was seeking buyers for AT&T Paradyne. (*Id.*) AT&T determined that in order to sell AT&T Paradyne as a viable business, it needed to take affirmative steps to preserve the intellectual capital embodied in AT&T Paradyne's workforce. (*Id.*) Accordingly, as of October 18, 1995, AT&T imposed a hiring restriction that prevented AT&T Paradyne employees from transferring to positions within AT&T or any of its affiliated companies (the "Preliminary Net"). (*Id.*)

In or around April 1996, Lucent began negotiations with affiliates of TPG for the sale of AT&T Paradyne. (*Id.*) The negotiations between Lucent and TPG culminated in the execution of a Purchase Agreement dated as of June 18, 1996 (the "Purchase Agreement"). (*Id.*) TPG wanted to ensure that certain employees of AT&T Paradyne, whose skills and expertise were viewed as an essential asset of the business, would remain part of the workforce for a period of time sufficient to facilitate

a successful transition from AT&T Paradyne to the new Paradyne Corporation. To achieve this purpose, the parties agreed that Lucent, AT&T, and their affiliated companies would not hire away AT&T Paradyne employees making in excess of $50,000 pending the closing of the sale. (Pet. App. at 43a – 44a.) This covenant, memorialized in Paragraph 4.5 of the Purchase Agreement, has been referred to throughout this litigation as the "Pre-Closing Net." (Pet. App. at 44a.)

In furtherance of the effort to maintain the employment of those Paradyne employees whose talents were needed for the short-term viability of the new Paradyne Corporation, the parties also entered into an Employee Matters Agreement dated as of July 31, 1996, the date of the closing. (*Id.*) Paragraph 1.3 of the Employee Matters Agreement prohibited Lucent, AT&T, and their affiliates from hiring certain Paradyne employees (*i.e.*, those earning more than $50,000) for 245 days after the closing. (*Id.*) This hiring restriction has been referred to throughout this litigation as the "Post-Closing Net." (*Id.*) The Post-Closing Net did not apply to employees who were involuntarily terminated by Paradyne after the closing.

Petitioners' contention that TPG "was unwilling to buy [AT&T] Paradyne if the purchase entailed continuing [AT&T] Paradyne's pension plan" (*see* Petition at p. 3) is not supported by the record below and, in fact, is inaccurate. As Paradyne's new owner, TPG could not under any circumstance have continued *Lucent's* pension plan. TPG did offered Paradyne employees a defined contribution plan.

Also inaccurate and unsupported by the record below is Petitioners' allegation that "Plaintiffs' pensions were eliminated if they worked for TPG, and Petitioners were prevented from retaining their pension rights by transferring to another AT&T affiliate as contemplated in the bridging right." (*See* Petition at p. 4.) The sale of AT&T Paradyne to TPG did not terminate the Lucent Pension Plan or Petitioners' rights therein. Petitioners continued to have fully-vested pension benefits in the Lucent Pension Plan following the sale; they simply could not, as

employees of the new Paradyne, accrue additional benefits under the Lucent Pension Plan. Not one penny of Petitioners' vested pension benefits were lost, and the Petitioners began to accumulate pension benefits under the new Paradyne's defined contribution plan. Further, Petitioners were not prevented by the sale from bridging their pension rights. Three of the twenty-nine Petitioners returned to employment with Lucent following the expiration of the Post-Closing Net and remained there long enough to bridge their service under the applicable provisions of the Lucent Pension Plan. (Pet. App. at 5a n.1.)

Shortly after the closing, Petitioners filed these consolidated actions alleging that the Preliminary, Pre-Closing and Post-Closing Nets violated § 1 of the Sherman Antitrust Act and § 510 of ERISA by depriving them of the opportunity to take advantage of the six-month bridging provision under the AT&T and Lucent Pension Plans. (Pet. App. at 45a – 46a.) The antitrust counts were dismissed by the District Court in an earlier ruling, and the dismissal of those counts was affirmed by the Third Circuit in *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert. denied*, 534 U.S. 1014 (2001) ("*Eichorn I*"). (Pet. App. at 45a.)

Following the Third Circuit's decision in *Eichorn I*, the District Court reopened discovery as to the ERISA claims. (Pet. App. at 6a.) On May 27, 2003, three months after the close of reopened discovery and seven years into the litigation of this case, Petitioners for the first time offered purported damage "calculations" as to lost future pension benefits. (*Id.*) These calculations were prepared by Petitioners' counsel's son, Stephen Crowley, who specifically was not offered as an expert and had no training as an actuary or in the field of employment benefits. (*Id.*) Although the District Court expressly warned Petitioners about their plan to proceed without expert testimony on the issue of damages, Petitioners insisted that no expert testimony was needed. (Pet. App. at 13a.)

On December 12, 2003, the Respondents filed a motion to strike Mr. Crowley's damages calculations and to bar him from testifying at trial. (Pet. App. at 46a.) In opposing the motion,

Petitioners argued that, if the District Court granted Respondents' motion, Petitioners should be permitted to engage a damages expert. (Pet. App. at 7a.) On November 10, 2004, the District Court entered an Order barring Stephen Crowley from testifying at trial; barring the admission of Stephen Crowley's calculations and report; and denying as untimely Petitioners' application to engage an expert witness. (Pet. App. at 46a.) The District Court's Order precluded Petitioners from admitting evidence of lost future pension benefits and expressly limited the scope of possible recovery to equitable relief and back pay. (*Id.*) Specifically, the District Court held that it did "not reach the issue whether Petitioners can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiffs' pension benefits and reserves such issue for resolution at or before trial." (Pet. App. at 8a.)

Following the entry of the District Court's Order, Respondents served narrowly tailored interrogatories upon the Petitioners addressing only the issue of damages (the "Damages Interrogatories"). (Pet. App. at 48a.) Interrogatory No. 5 required each Petitioner to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." (*Id.*) Each of the Petitioners who responded to this interrogatory purported to calculate some form of monetary damages. (Pet. App. at 49a.) No equitable relief was demanded. (Pet. App. at 50a.)

Based upon Petitioners' answers to the Damages Interrogatories, Respondents filed a motion for summary judgment on the grounds that the relief demanded by Petitioners could not be recovered under the relevant civil enforcement provision of ERISA. (Pet. App. at 46a.) The District Court granted Respondents' motion, holding (1) that Petitioners' claims under § 510 of ERISA could not be enforced through the remedial provisions of § 502(a)(1)(B), and (2) that the money damages sought by Petitioners could not be recovered under

the "appropriate equitable relief" language of § 502(a)(3). (Pet. App. at 53a – 68a.) The District Court found that the damages sought by the Petitioners, whether characterized as compensatory or restitutionary, were not equitable in nature and therefore not recoverable as part of a § 510 claim under ERISA. (*Id.*)

On May 2, 2007, a three-judge panel of the Third Circuit affirmed the District Court's award of summary judgment in favor of Respondents and further held that the District Court was well within its discretion in excluding Stephen Crowley's damage calculations and testimony and in denying Petitioners' untimely application to engage a damages expert. *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007) ("*Eichorn II*"). On May 31, 2007, the Third Circuit denied Petitioners' application for rehearing and rehearing *en banc*. (Pet. App. at 33a.) On August 31, 2007, Petitioners filed a Petition for Writ of Certiorari with this Court. In their Petition, Petitioners are seeking review only of the award of summary judgment. (Petition at p. *i*.) Petitioners are not appealing the exclusion of Stephen Crowley's damages calculations and testimony, or the denial of their application to engage a damages expert. (*Id.*)

REASONS FOR DENYING THE PETITION

The rulings by the District Court and the Third Circuit do not conflict with either a decision of this Court or a decision of any Court of Appeals. Nor do the lower court rulings implicate an important question of federal law that has not previously been addressed by this Court. Thus, Petitioners have not demonstrated any compelling reasons for granting their Petition, as required by Supreme Court Rule 10.

I. The Rulings Of The Courts Below Are Not In Conflict With Any Decision Of This Court.

A. The Decisions Of The District Court And Third Circuit Do Not Conflict With *Varity*.

Petitioners argue that the rulings of the District Court and the Third Circuit in *Eichorn II* conflict with *Varity Corp. v.*

Howe, 516 U.S. 489 (1996), because they denied relief "identical" to that awarded to the *Varity* plaintiffs. This simply is not true. In *Varity*, the plaintiffs were seeking the equitable remedy of reinstatement to a welfare benefits plan that they had been defrauded into leaving. At no time over the ten years that this case has been litigated have Petitioners ever sought reinstatement to employment with Lucent. Indeed, Petitioners have no need for reinstatement because unlike the plaintiffs in Varity, they have at all times remained vested pension beneficiaries in the Lucent Pension Plan. The reality is that Petitioners are not seeking any equitable remedy at all – in the form of reinstatement or otherwise.

In *Varity*, the defendant-employer transferred several unprofitable divisions of a subsidiary corporation to a new corporate entity and persuaded many of the employees working in those divisions to switch their benefits to the plan offered by the new entity. *Varity*, 516 U.S. at 493-94. The employer assured the employees that their benefits would remain secure even though the employer knew from the outset that the new entity was insolvent. *Id.* at 494. In a matter of two years, the new entity was in receivership, resulting in the loss of the employees' non-pension benefits. *Id.* Proceeding under § 502(a)(3), the plaintiff-employees sought to recover for the employer's breach of fiduciary duty and were awarded reinstatement to the plan that they had been deceived into leaving. *Id.* at 494-95.

Petitioners claim that the relief they seek is consistent with the relief sought by the *Varity* plaintiffs. Petitioners contend that they, like the plaintiffs in *Varity*, are seeking equitable relief that would result in a modification of plan records. This claim is demonstrably false for numerous reasons.

1. Petitioners Are Not Seeking Reinstatement Or Any Other Form of Equitable Relief.

Petitioners are not seeking the type of equitable relief awarded in *Varity*. The *Varity* plaintiffs were reinstated to a self-funded *welfare* benefits plan. *Varity*, 516 U.S. at 492. All claims

regarding pension benefits had been settled. *Howe v. Varity Corp.*, 36 F.3d 746, 749 (8th Cir. 1994), *cert. granted*, 514 U.S. 1082 (1995), *aff'd*, 516 U.S. 489 (1996). The order of reinstatement would have compelled the employer to provide the plaintiffs with basic health, major medical, life insurance, vision care, hearing care, and dental benefits. *See id.* Such an order clearly constitutes a mandatory injunction compelling the employer to perform specific action and thus is unquestionably equitable in nature.

However, even if the *Varity* plaintiffs had been reinstated to a pension benefits plan, that relief would be distinguishable from the remedy sought by Petitioners. When the *Varity* plaintiffs left their jobs with the healthy subsidiary to move the failing subsidiary, they took with them all of their vested pension benefits. When the new entity folded, all of the plaintiffs' vested pension benefits were lost. An order reinstating the plaintiffs to the pension benefits plan of the healthy subsidiary would have restored to plaintiffs the benefits that already belonged to them but had been destroyed as a result of their employer's fraud in the inducement.

Although labeled as "reinstatement," the relief awarded in *Varity* was very much akin to the rescission remedy crafted by the Fourth Circuit in *Griggs v. E.I. DuPont de Nemours & Company*, 385 F.3d 440 (4th Cir. 2004). In Griggs, the plaintiff took early retirement after learning that he was eligible to participate in DuPont's temporary pension system, a program that paid eligible employees one month's salary for every two years of service. *Griggs*, 385 F.3d at 442. The early retirement benefit could be taken in the form of a lifetime annuity with monthly payments that would be subject to federal taxes or as a lump sum that could be rolled over into a tax-free IRA or other qualified retirement account. *Id.* Plaintiff elected the lump-sum distribution. *Id.* Before plaintiff officially retired, however, DuPont learned that because of plaintiff's salary level, his lump-sum benefit could not be rolled over and would be subject to federal taxes. *Id.* DuPont never informed plaintiff of this, and

when he retired, DuPont withheld $50,000.00 of his $132,000.00 benefit for federal taxes. *Id.* Plaintiff sued under § 502(a)(3), and the district court determined that DuPont had breached its fiduciary duty by failing to tell plaintiff that he was ineligible for a tax-free lump-sum distribution. 385 F.3d at 442. Ultimately, the district court fashioned a rescission remedy, *i.e.*, allowing plaintiff to rescind his original election of a lump-sum payment and select the annuity payment instead. *Id.* at 443. Rescission is, of course, a remedy traditionally available in equity. Therefore, the Fourth Circuit upheld the rescission of plaintiff's election as equitable relief under § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.*

In *Varity*, the plaintiffs were similarly allowed to rescind their election to join the benefits plan of the new subsidiary and to return to the original plan. The plaintiffs were thus restored to their pre-election position. Here, Petitioners are not looking to be restored to their pre-sale position. Prior to the sale, Petitioners had deferred vested pension benefits in the Lucent Pension Plan, and they maintained those exact benefits after the sale. Petitioners, therefore, have no need for reinstatement/ rescission. Petitioners instead seek enhancement of their pre-sale position and credit for service that they never gave to Lucent, AT&T, or any of their affiliated companies, service which Petitioners admit was dependent upon their continued employment with a Lucent or AT&T affiliated company. (*See* Petition at p. 11.) Awarding Petitioners enhanced pension benefits on the basis of service that they never gave constitutes a windfall to Petitioners. Certainly, it is not, as Petitioners suggest, judicial adherence to the equitable maxim that equity regards as done that which ought to be done. Rather, it is an undeniable award of compensatory damages.

2. Petitioners Are Seeking Money Damages In Compensation For A Loss Allegedly Suffered At The Hands of Respondents.

Petitioners' alleged equitable relief is nothing more than a prayer for compensatory damages poorly cloaked in the mantle

of equity. However, this Court has made abundantly clear that § 502(a)(3), which is the applicable remedial provision for claims under § 510, 29 U.S.C. § 1140, permits awards of equitable relief only. *Mertens v. Hewitt Associates*, 508 U.S. 248, 257-58 (1993). Compensatory damages or awards of restitution at law are not recoverable under § 502(a)(3). *Mertens*, 508 U.S. at 257-258; *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 215 (2002).

Each and every Petitioner who responded to the Damages Interrogatories served by Respondents purported to calculate some form of money damages. Interrogatory No. 5 required each Respondent to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." The responses, without objection, caveat, or reference to injunctive relief, uniformly invoke formulae and manipulate numbers in order to arrive at amounts of money damages allegedly owed to Petitioners. The money damages sought by Petitioners cannot qualify as equitable relief. As this Court explained in *Great-West*,

> [a]lmost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty.

Great-West, 534 U.S. at 210 (citations omitted).

In an attempt to circumvent § 502(a)(3)'s clear mandate against compensatory damages, Petitioners claim that they are seeking equitable relief in the form of an order or decree crediting them with additional service time and recalculating their benefits. In reality, Petitioners' proposed "equitable decree" is simply euphemism for an award of money damages. Petitioners

cannot overcome § 502(a)(3)'s prohibition against the recovery of monetary damages simply by attaching an equitable label to a legal remedy. *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587, 595 (6th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005) (holding that plaintiff's demand for a constructive trust could not "transmogrify" his legal claim for a money judgment into an equitable remedy). *See also Bowen v. Massachusetts*, 487 U.S. 879, 915-16 (1988) (Scalia, J., dissenting) ("It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.") In effect, Petitioners' request for an equitable decree is a demand for an injunction to compel payment of money. However, that type of relief could not be awarded in equity because it was the functional equivalent of a claim for money damages. *Great-West*, 534 U.S. at 210-11. Thus, Petitioners' so-called equitable decree is not an equitable form of relief at all.

For all of the reasons set forth above, the District Court and Third Circuit's decisions are not in conflict with the reasoning articulated by this Court in *Varity*.

B. The Decisions Of The District Court And Third Circuit Do Not Conflict With *Bowen*.

Petitioners contend that the lower court rulings were in conflict with "a *minor* aspect" of this Court's ruling in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *Bowen*, which is not an ERISA case, addresses the circumstances under which an order for the prospective payment of money is regarded as equitable as opposed to legal relief. Neither the District Court nor the Third Circuit discussed *Bowen* in its decision. Because *Bowen* is both legally and factually distinguishable from the matter under consideration, there was no reason for the lower courts to focus on it. The absence of a discussion of *Bowen* in the lower courts' analyses does not present a compelling reason to grant the Petition.

In *Bowen*, the Department of Health and Human Services ("HHS") denied Medicaid reimbursement to the State of Massachusetts for certain medical and rehabilitative services. *Bowen*, 487 U.S. at 886-87. The state appealed to HHS' Grant Appeals Board, which affirmed the disallowances. *Id.* at 887. The state then filed a complaint with United States District Court. *Id.* The district court reversed the Board's disallowance, and HHS appealed to the First Circuit on the grounds that the district court lacked subject matter jurisdiction to review the Board's disallowance decision and that the appropriate remedy was a suit for past due amounts in the United States Claims Court. *Id.* at 888-90. The First Circuit affirmed in part and reversed in part, holding that the district court had jurisdiction to review the Board's disallowance and grant injunctive and declaratory relief, but not to order the release of the disallowed funds to the state. *Id.* at 889-90.

This Court granted certiorari and held that the district court's decision should have been affirmed in its entirety because the order compelling HHS to perform its statutory obligations was one for injunctive relief, not money damages. *Id.* at 891, 900-01. This Court explained that performance of HHS' statutory obligations in this instance happened to involve the payment of money. *Id.* at 901. The fact that money would pass from the federal government to the state as a result of ordering HHS to carry out its statutory mandate did not, according to this Court, transform the nature of the relief sought from specific relief, which is equitable, to money damages, which are legal. *Id.* at 901 (citations omitted).

In its opinion, the *Bowen* majority opinion did not distinguish between the order compelling HHS to make past-due reimbursements and the order compelling HHS to make future reimbursements. Under the majority's reasoning, both orders required HHS to satisfy its statutory mandate and therefore constituted specific, *i.e.*, equitable, relief. The dissent, however, agreed only that the order compelling prospective payment was equitable. *Id.* at 921-22. Petitioners seize upon

this point of agreement between the majority and the dissent to claim that *Bowen* stands for the proposition that all relief compelling future payment is equitable. This is a complete misapprehension of *Bowen*. As Justice Scalia explained in his dissent, an order preventing the wrongful disallowance of future payment is equitable in nature because the potentially damaging action has yet to occur. *Id.* The order is not so much compelling future payment as it is enjoining the denial of future payment. Here, Petitioners are not seeking recovery for a wrong that they allege has yet to occur. They are seeking recovery of damages for the fictitious "elimination" of their "bridging rights" under the Lucent Pension Plan allegedly caused by the Post-Closing Net. The Post-Closing Net expired in April of 1997. Thus, the "damage" allegedly caused by the Post-Closing Net is done and cannot recur, as it can when the federal government disallows Medicaid reimbursements to a state year after year on the same grounds. Petitioners are not seeking an injunction compelling Respondents to honor an obligation for future payment of money; they are seeking money in compensation for an alleged past wrong. *Bowen* clearly states that that type of relief constitutes damages, the classic legal remedy. *Bowen*, 487 U.S. at 900-01. Thus, the relief sought in *Bowen* is legally distinguishable from the relief sought by Petitioners.

Even if *Bowen* could somehow be extrapolated to support the theory that awards of *future* pension benefits are equitable relief under § 502(a)(3), the Petitioners are precluded by the District Court's Order of November 10, 2004, from seeking such relief. That Order barred Stephen Crowley from testifying at trial, barred the admission of Stephen Crowley's calculations and report, and denied as untimely Petitioners' application to engage an expert witness. The District Court's Order expressly limited the scope of possible recovery to back pay and/or equitable relief and prevents Petitioners from seeking to admit evidence of lost future pension benefits. The Third Circuit affirmed the November 10, 2004 Order, finding that the District Court did not err in holding that the proposed damages

calculations were inadmissible and that it did not abuse its discretion in denying leave to retain an expert witness. The Petitioners had ample opportunity during seven years of discovery to engage a damages expert and made a deliberate, strategic decision not to retain one even after repeated warnings from the District Court. Petitioners are not seeking review of the November 10, 2004 Order in their Petition. Thus, any and all of Petitioners' arguments regarding their alleged entitlement to *future* pension benefits under § 502(a)(3) should not be considered by this Court.

Because *Bowen* is both legally and factually inapplicable to the case at bar, it does not present a compelling reason to grant the Petition.

II. The Rulings Of The Courts Below Are Not In Conflict With The Decision Of Another Court Of Appeals.

Petitioners contend that Third Circuit's decision in *Eichorn II* is in conflict with rulings by other Courts of Appeals. Specifically, Petitioners argue that *Eichorn II* is contrary to holdings by the Tenth Circuit in *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246 (10th Cir. 2004) and *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); and by the Ninth Circuit in *Mathews v. Chevron Corporation*, 362 F.3d 1172 (9th Cir. 2004) and *Ennis v. Ennis*, 198 Fed. Appx. 594 (9th Cir. 2006). In fact, all of the purportedly conflicting opinions cited by Petitioners are in accord with the Third Circuit's analysis in *Eichorn II*. Therefore, there is no compelling reason to grant the Petition based upon a split among the Circuits.

A. The Tenth Circuit's Decision in *Millsap* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners claim that in *Millsap*, 368 F.3d 1246 (10th Cir. 2004), the Tenth Circuit entered an "equitable decree" that reflected a "willingness ... to use § 502(a)(3) to command affirmative changes affecting benefit entitlement, without regard

to the impact of such changes on monetary relief." (*See* Petition at pp. 9-10.) The entry of this equitable decree, Petitioners allege, is in conflict with the Third Circuit's decision in *Eichorn II*. In reality, the Tenth Circuit did not grant the *Millsap* plaintiffs any equitable relief. Moreover, the Tenth Circuit categorically rejected the argument that § 510 claimants can recover back pay, the only remedy arguably available to Petitioners here following the District Court's Order of November 10, 2004. Therefore, *Millsap* is in complete accord with the Third Circuit's decision.

In *Millsap*, the defendant, a military aircraft manufacturer, closed its assembly plant in Tulsa, Oklahoma and laid off all of its employees. *Millsap*, 368 F.3d at 1248. The employees brought suit under § 510 of ERISA alleging that the defendant closed the plant in order to prevent the employees from attaining benefits eligibility under the pension and health care plans. 368 F.3d at 1248. The district court bifurcated the case into liability and remedial phases. *Id.* After a 10-day bench trial, the district court concluded that the defendant violated § 510. 368 F.3d at 1248. In the remedial phase, plaintiffs sought, *inter alia*, restoration of benefits, back pay, and reinstatement (or front pay in lieu of reinstatement). Defendants moved to preclude awards of front pay, back pay and reinstatement. *Id.* at 1249. The district court denied defendants' motion as to back pay, but granted it as to front pay and reinstatement, finding that the former was inappropriate and the latter impossible under the circumstances. *Id.* Before the remedial phase proceeded any further, the parties entered into a stipulation of settlement, which compensated plaintiffs for their lost benefits and required judicial resolution of the back pay issue. *Id.* Thus, as in *Eichorn II*, the only remaining issue to be resolved by the court was the question of whether back pay was an appropriate equitable remedy under § 502(a)(3). The district court held that the plaintiffs could recover back pay under § 502(a)(3) because it was equitable restitution. *Millsap*, 368 F.3d at 1249. Plaintiffs did not appeal the denial of reinstatement or front pay to the

Tenth Circuit. *Id.*, n.3. On this issue of back pay, the Tenth Circuit resoundingly held that back pay in and of itself is not an equitable remedy and cannot be recovered by a § 510 plaintiff under § 502(a)(3) unless it is attendant to some form of equitable relief. *Millsap*, 368 F.3d at 1253.

The *Millsap* case is virtually indistinguishable from the instant matter. In *Millsap*, a stipulation of settlement was entered, reducing the available remedies to back pay. *Millsap*, 368 F.3d at 1249. Here, the District Court entered the November 10, 2004 Order limiting potential recovery to back pay. Freed from having to address the question of future pension benefits and focused solely on the issue of whether back pay is appropriate equitable under § 502(a)(3), the Tenth Circuit in *Millsap* and the Third Circuit in *Eichorn II*, relying on this Court's holding in *Great-West*, both concluded that it is not.

Finding no support in the decision that the Tenth Circuit actually rendered, Petitioners combed dicta to advance the hypothetical argument that, if the Tenth Circuit had addressed the issue of lost pension benefits, it would have granted the relief that the Third Circuit denied. (*See* Petition at p. 19.) Petitioners claim that "*Millsap* concluded that because § 510's 'purpose is to protect the participants in *employee benefit plans*' . . . claims for lost wages do not stand on the same protected footing as claims for lost benefits." (Petition at p. 19 (quoting *Millsap*, 368 F.3d at 1259 (emphasis in original))). The quote from *Millsap* is taken completely out of context. The full quote is: "We too have rejected claims for complete relief under ERISA because the statute's purpose is to protect the interests of participants *in employee benefit plans*." *Millsap*, 368 F.3d at 1259 (emphasis in original). The Tenth Circuit was explaining that ERISA is not a make-whole statute and that its drafters were primarily concerned with protecting the plan as opposed to individual beneficiaries. (*Id.*) The court was offering the reasons why it is sometimes necessary to deny relief to individual plaintiffs. It was in no way suggesting that the outcome would have been any different under § 502(a)(3) if lost benefits were

being sought rather than back pay. Moreover, Petitioners cannot demonstrate a split among the circuits based upon a ruling that they think the Tenth Circuit would have made if it had addressed the issue. Thus, *Millsap* offers no authority for granting the Petition.

B. The Tenth Circuit's Decision in *Wal-Mart* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners' reliance on *Wal-Mart* is completely misplaced. *Wal-Mart* is one of a discrete line of cases, beginning with this Court's ruling in *Great-West*, that deals with the ability of ERISA-regulated medical plans to use § 502(a)(3) to enforce subrogation clauses to recover the costs of benefits that were reimbursed by third parties. *See Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004). These cases articulate the circumstances under which reimbursement of funds to a medical plan constitutes equitable relief. In *Great-West*, the plan administrator was denied reimbursement because the administrator did not seek recovery from a particular fund upon which a constructive trust or equitable lien could be imposed but rather from the beneficiary's general assets, making the relief sought equivalent to "a judgment imposing personal liability upon the defendant to pay a sum of money." *Great-West*, 534 U.S. at 213-14. However, in *Sereboff v. Mid Atlantic Medical Service, Inc.*, 126 S. Ct. 1869 (2006), the plan administrator was permitted to recover the cost of benefits because it was seeking to enforce an equitable lien by agreement. *Sereboff*, 126 S. Ct. at 1875. This Court held that the language of the plan document created a lien in a specifically identifiable fund, *i.e.*, in any monies recovered from third-party tortfeasors, and that enforcement of that lien was a form of equitable remedy under § 502(a)(3). 126 S. Ct. at 1875.

Wal-Mart antedates *Great-West* and predates *Sereboff*. The Petitioners argue that because the Tenth Circuit's decision in *Wal-Mart* allowed the medical plan to recover monetary relief

under § 502(a)(3), *Wal-Mart*, 393 F.3d at 1126, it conflicts with the Third Circuit's allegedly narrow reading of *Great-West* in *Eichorn II*. Petitioners are mistaken. The Tenth Circuit in *Wal-Mart* and the Third Circuit in *Eichorn II* analyzed and applied *Great-West* in exactly the same way. Both courts correctly recognized that *Great-West* poses the threshold question of whether the relief sought was equitable in nature. In *Wal-Mart*, the answer to that question was yes. Although *Sereboff* had yet to be decided, in retrospect it is clear that the plan administrator in *Wal-Mart* was seeking enforcement of an equitable lien by agreement. *Wal-Mart*, 393 F.3d at 1120. Even under a pre-*Sereboff* analysis, the relief sought in *Wal-Mart* was equitable, namely, the imposition of a constructive trust over a specified fund in the constructive possession of the beneficiary. *Wal-Mart*, 393 F.3d at 1119, 1121. In *Eichorn II*, the Third Circuit correctly answered *Great-West*'s threshold inquiry in the negative because Petitioners are not seeking monetary relief through legitimate and recognized equitable means. At no time, have Petitioners sought the imposition of an equitable lien or a constructive trust. Nor have Petitioners ever pointed to a specifically identifiable fund that belongs in good conscience to them but instead is in the possession and control of the Respondents. Rather, Petitioners are seeking an award of make-whole money damages from the general assets of the Respondents. This is especially true in the case of Respondent TPG, which was never in possession, custody or control of any funds in any way connected to the Lucent or AT&T Pension Plans. Therefore, the Third Circuit's denial of relief in *Eichorn II* was in complete accord with this Court's decision in *Great-West* and the Tenth Circuit's decision in *Wal-Mart*.

C. The Ninth Circuit's Decision in *Mathews* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners argue that the *Mathews* decision supports the proposition that under § 502(a)(3), a court may enter an equitable decree modifying the records of a pension plan. *See* Petition at

p. 10 (citing *Mathews v. Chevron Corporation*, 362 F.3d 1172, 1177 (9th Cir. 2004)). However, because of distinguishing factual circumstances, the relief granted in *Mathews* cannot be awarded to the Petitioners here. Therefore, the Third Circuit's decision below is not in conflict with the Ninth Circuit's reasoning in *Mathews*.

Plaintiffs in *Mathews* were retired former employees of Chevron's refinery in Richmond, Virginia. *Mathews*, 362 F.3d at 1177. Shortly after plaintiffs retired, the Richmond refinery implemented a favorable severance program which provided a benefit enhancement to any plan participant who was terminated without cause during a specified period of time. *Id.* at 1176, 1178. Although only involuntarily terminated employees were eligible for this program, employees could request involuntary termination in order to receive the enhanced benefit. *Id.* at 1176. Implementation of the program, which had been in effect throughout Chevron during plaintiffs' employment, was delayed in Richmond by local management. *Id.* at 1177-78. The plaintiffs successfully sued, alleging breach of fiduciary duty, and sought an injunction requiring Chevron to modify its plan records to reflect that plaintiffs had been involuntarily terminated. *Id.* at 1176. The Ninth Circuit upheld this relief as equitable in nature. Analogizing to the reinstatement remedy approved in *Varity*, the court held that "[i]f 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." *Mathews*, 362 F.3d at 1186.

The Petitioners cite *Mathews* in support of the proposition that, under § 502(a)(3), a court may order a modification of plan records from which monetary relief may flow. Whether the instatement relief awarded in *Mathews* is, in fact, the equitable equivalent of *Varity*'s reinstatement remedy is by no means clear. Assuming for the moment that instatement is indeed an equitable remedy, it is in no way comparable to the relief being sought by Petitioners here. The modification to the plan records in *Mathews* involved a simple change in plaintiffs' status

from retired to terminated and did not credit plaintiffs with additional service that they had not provided to their former employer. The modifications necessary for Petitioners to obtain the relief that they are seeking would require fictionalizing the Lucent Pension Plan records. The records would have to be changed to credit Petitioners with service that they never gave to Lucent. This change would be predicated on the highly speculative assumption that, but for the Post-Closing Net, all of the Petitioners would have been rehired by Lucent, AT&T or one their affiliates within six months and that the Petitioners would have continued to work in those positions for an amount of time sufficient to achieve service pension eligibility. The *Mathews* case which Petitioners rely so heavily upon establishes that a plan modification cannot be awarded under such uncertain circumstances. *Mathews*, 362 F.3d at 1186. The Ninth Circuit stated that the sole reason plaintiffs were receiving the relief they requested was because Chevron stipulated that any employee who requested involuntary termination under the severance program would have received it. *Id.* This stipulation removed any uncertainty over whether plaintiffs would have met the other miscellaneous requirements to qualify for the enhanced benefit. *Id.* However, there is no comparable stipulation in the present case. Therefore, the Third Circuit decision denying Petitioners relief under § 502(a)(3) was appropriate and was not in conflict with *Mathews*.

D. The Ninth Circuit's Unreported Decision in *Ennis* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners contend that, like *Bowen*, *supra*, *Ennis* recognizes that an order compelling fulfillment of a future obligation is equitable in nature and, hence, available under § 502(a)(3). *See* Petition at p. 23 (citing *Ennis v. Ennis*, 198 Fed. Appx. 594, 596 (9th Cir. 2001)). Petitioners, therefore, argue that like *Bowen*, *Ennis* is in conflict with the Third Circuit's decision herein. Petitioners again overlook factual distinctions that make *Ennis* inapposite to the instant case.

In particular, Petitioners fail to acknowledge – yet again – that the District Court's Order of November 10, 2004 precludes them from recovering future pension benefits. Therefore, like *Bowen*, *Ennis* does not create a compelling reason to grant the Petition.

In *Ennis*, plaintiff sued to enforce a promise by his former employer, a small business, to provide him with a pension. *Ennis*, 198 Fed. Appx. at 596. The district court held that plaintiff had a valid promissory estoppel claim and that the relief he sought was authorized by ERISA. *Id.* The district court entered an order compelling the employer to fund a pension for the plaintiff even though the employer's pension plan had been terminated. *Id.* The Ninth Circuit affirmed, holding that the district court's injunction was akin to an order reinstating a plaintiff in a benefits plan. *Id.* The Ninth Circuit further held that the relief sought was not legal in nature because it did not compel the payment of money past due under a contract, or specific performance of a past due monetary obligation. *Id.* Instead, it ordered the employer to fulfill a future obligation by creating a rabbi trust to fund a pension which plaintiff could draw on at a later date. *Id.*

Ennis is distinguishable from the instant matter in several ways. First, as discussed above, the instatement/reinstatement remedy, to which the *Ennis* injunction is allegedly akin, has not been sought by Petitioners here, nor would it be appropriate relief even it had been sought. Second, the Ninth Circuit held that the relief awarded in *Ennis* was equitable because it did not compel payment of past due amounts. *Ennis*, 198 Fed. Appx. at 596. Here, however, Petitioners are seeking payment of allegedly past due amounts from Respondents. Finally, the relief in *Ennis* essentially awarded future pension benefits, relief that is unavailable to Petitioners here because of the District Court's November 10, 2004 Order, which Petitioners have not appealed. Because of these factual distinctions, *Ennis* is not in conflict with the ruling of the Third Circuit below.

III. The Applicability Of § 502(a)(1)(B) To § 510 Claims Does Not Implicate An Important Question Of Federal Law That Has Not Previously Been Addressed By This Court, Nor Does It Involve A Split Among The Circuits.

Petitioners argue that the applicability of § 502(a)(1)(b) to § 510 claims implicates an important question of federal law that has not previously been but should be addressed by this Court. Although this Court has not issued a definitive holding on the subject, there is no need for this Court to take up the issue at this time. The language of the statute is clear and unmistakable, and the Courts of Appeals have been uniform in their interpretation of it. Therefore, the question of enforcement of § 510 through § 502(a)(1)(B) does not present a compelling reason to grant the Petition.

Section 502(a)(1)(B) enables a plan participant or beneficiary to "recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Courts interpreting this language have consistently held that the cause of action established in § 502(a)(1)(B) involves the assertion of a contractual right. *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 150 (E.D.N.Y. 1996). Thus, to recover under § 502(a)(1)(B), a plaintiff must allege that the defendant failed to abide by a particular term or terms of an employee benefit plan. *Russell*, 921 F. Supp. at 150. (citations omitted). As this Court noted in dicta in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the language of § 502(a)(1)(B) "says nothing about the recovery of extracontractual damages." *Mass. Mutual*, 473 U.S. at 144. Therefore, implicitly only damages arising from a contractual cause of action are available under § 502(a)(1)(B). *Mass. Mutual*, 473 U.S. at 144.

Section 510, on the other hand, does not focus on the wrongful denial of contractual rights to which a participant is already entitled under the terms of the plan. *Russell*, 921 F. Supp.

at 150. Rather, § 510 prohibits a defendant's unlawful interference with a participant's ability to meet plan qualifications in the first instance. *Russell*, 921 F. Supp. at 150. The Seventh Circuit has held that the remedy afforded by § 502(a)(1)(B), *i.e.*, vindication of a *contractual* right, is incompatible with the *extracontractual* cause of action provided in § 510. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992).

> When someone raises a Section 502(a)(1)(B) claim, he or she is essentially asserting his or her contractual rights under an employee benefit plan. And, the wrong that the person alleges in bringing such an action is that despite the fact that he or she has satisfied the conditions necessary for benefits under the plan, the defendant has failed to abide by the terms of the plan. *Not surprisingly, this court has concluded that Section 502(a)(1)(B) claims are creatures of contract law . . . Section 510, unlike Section 502(a)(1)(B), is not concerned with whether a defendant complied with the contractual terms of an employee benefit plan. Rather, the emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan.*

Tolle, 977 F.2d at 1133-34 (citations omitted) (emphasis added). *Accord Strom v. Goldman Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999) (holding that a claim under § 502(a)(1)(B) is the "assertion of a contractual right under a benefit plan"); *Læmis v. Medical Services Research Group, Inc.*, 2003 WL 22220527 (6th Cir.) at *2-3 (adopting the position articulated by the Seventh Circuit in *Tolle*).

Petitioners here do not allege that any particular provision of the Lucent Pension Plan has been violated, nor do they seek

a judgment enforcing any provision of the plan. Instead, Petitioners allege that Respondents' actions in connection with the sale of AT&T Paradyne, specifically the imposition of the Pre-Closing and Post-Closing Nets, interfered with Petitioners' ability to accrue additional benefits under the Lucent Pension Plan. Because no breach of any provision of the Lucent Pension Plan has been or can be alleged, the lower courts correctly held that § 502(a)(1)(B) does not provide the remedy for Petitioners' § 510 claims.

The three Court of Appeals decisions that Petitioners contend support the position that § 510 can be enforced through § 502(a)(1)(B), in fact, do not support that position. Puzzlingly, Petitioners cite to the Third Circuit's opinion in *Cox v. Keystone Carbon Company, et al.*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), even though, as the Third Circuit expressly stated in *Eichorn II*, the *Cox* opinion does not contain an analysis of whether § 510 could be enforced through § 502(a)(1)(B). In fact, the Third Circuit correctly noted in *Eichorn II* that *Cox* actually undermines the Petitioners' argument because in *Cox*, the court stated that "*[t]o the extent that Cox seeks compensatory damages for tortious interference [under § 510], that claim does not fall within section 502(a)(1)(B).*" 894 F.2d at 650 (emphasis added). Thus, *Cox* does nothing to advance Petitioners' argument that § 502(a)(1)(B) offers a remedy for violations of § 510.

Petitioners also cite to *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), as another case allowing enforcement of a § 510 claim through § 502(a)(1)(B). *Adams* does no such thing. *Adams* involved a claim for breach of fiduciary duty under § 409 of ERISA, not a claim for interference with the attainment of benefits under § 510. *Adams*, 149 F.3d at 1158. Moreover, the plaintiffs in *Adams* were seeking an interpretation of certain provisions of the benefit plan and a declaration of their rights pursuant thereto. *Id.* Thus, in *Adams*, plaintiffs' claims arose out of the language of the contract and

were appropriately remedied under the terms of § 502(a)(1)(B). Here, Petitioners are not seeking relief for a contractual infraction. Indeed, Petitioners have never alleged that Respondents failed to comply with any specific plan provision, nor could they. Instead, Petitioners are pursuing an extracontractual claim, which cannot be remedied through § 502(a)(1)(B).

Finally, Petitioners cite language from *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587 (6th Cir. 2004), which implies that the plaintiff therein might have been successful if he had elected to proceed under § 502(a)(1)(B) rather than § 502(a)(3). *Crosby* in no way advances Petitioners' theory that § 510 can be enforced through § 502(a)(1)(B) because *Crosby* did not involve a § 510 claim. The plaintiff in *Crosby* claimed that he was paid a benefit that fell $5,249.08 short of what he was entitled to. *Crosby*, 382 F.3d at 590-91. Thus, his cause of action was for recovery of benefits due him under the terms of the plan. He not only could have but should have proceeded under § 502(a)(1)(B) rather than § 502(a)(3).

Petitioners have not proffered a single Court of Appeals decision holding that § 510 can be enforced through the remedial provision of § 502(a)(1)(B). That is because the Circuits are in accord in their interpretation of the plain language of the statute. Even though this Court has never directly addressed the interplay between § 510 and § 502(a)(1)(B), the unanimity of opinion among the Courts of Appeal demonstrates that there is no compelling reason for this Court to take up the issue.

IV. The Lower Courts' Decisions Do Not Have The Effect Of Nullifying All Claims For Relief Under § 510.

Petitioners argue that the lower courts' dismissal of their ERISA claim violates accepted rules of statutory construction and effectively nullifies all claims for relief under § 510. Petitioners could not be more mistaken. Section 510 claimants have ample relief available to them – equitable relief. The fact

that Petitioners here have not articulated a viable claim for equitable relief does not mean that an equitable remedy can never be fashioned for a § 510 claimant under § 502(a)(3). The rescission remedy fashioned by the Fourth Circuit in *Griggs, supra,* is just one such remedy. *Griggs,* 385 F.3d at 443. Although *Griggs* involves a claim for breach of fiduciary duty as opposed to a violation of § 510, the case is an example of a workable equitable remedy under § 502(a)(3).

Even in the event that an equitable remedy is not available under § 502(a)(3), courts cannot override ERISA's plain language in favor of policy concerns. In *Callery v. United States Life Insurance Company in the City of New York, et als.,* 392 F.3d 401 (10th Cir. 2004), *cert. denied,* 126 S. Ct. 333 (2005), plaintiff argued that the stringent reading of the equitable relief provisions of § 502(a)(3) essentially left her without a remedy and failed to safeguard claimants from the very violations against which ERISA was designed to protect. *Id.* at 406-07. In dismissing that argument, the Tenth Circuit looked to *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993), which holds that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding specific issues under consideration." *Callery,* 392 F.3d at 407 (quoting *Mertens,* 508 U.S. at 261-62). Thus, courts are bound to interpret ERISA based upon a plain reading of its language even if that has the effect of leaving some plaintiffs without a remedy. *Id.*

In *Calhoon v. Trans World Airlines, Inc.,* 400 F.3d 593 (8th Cir. 2005), the Eighth Circuit reiterated the position taken in by the Tenth Circuit in *Callery* that ERISA claimants can be left without redress if the remedial provisions of the statute simply will not support a recovery. *Calhoon,* 400 F.3d at 598. The plaintiff in *Calhoon* argued that it was contrary to the purpose of ERISA to leave him without a remedy. *Id.* However, the Eighth Circuit noted that, according to this Court, "the judicial branch may not expand the remedial scheme prescribed in ERISA based on vague notions of policy, particularly when the

text of the statute and the Supreme Court's interpretation of the text are specific about available remedies." *Id.* (citing *Great-West*, 534 U.S. at 220-21).

Those who, like Petitioners, believe that every benefits-oriented wrong must have a remedy under ERISA incorrectly assume that ERISA is a make-whole statute, like Title VII. It is not. ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – *not all in favor of potential plaintiffs*." *Mertens*, 508 U.S. at 262 (emphasis added). The goal of the statute was to balance employee rights against the employer's escalating pension costs. *Id.* at 262-63. Congress did not want ERISA to have a chilling effect on employer funding of pensions plans, so it drafted a statute that does not resolve every dispute in favor of the employee.

Even when fulfilling its primary goal of benefiting employees, ERISA does not grant relief to every individual plaintiff. As this Court has noted, "[a] fair contextual reading of that statute makes it abundantly clear that its draftsmen were primarily concerned with possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with rights of an individual beneficiary." *Mass. Mutual*, 473 U.S. at 142. Thus, it is understood and accepted that under ERISA certain individual plaintiffs can be left without a remedy. Petitioners fall within that category.

Section 510 is the wrongful termination/retaliatory discharge provision of ERISA. The typical § 510 case arises when an employer terminates an employee to prevent his or her pension rights from vesting. As is the case in other employment-related statutes, the anticipated remedy for such wrongful termination is reinstatement, which restores the employee to a position that will allow him or her to attain eligibility. Because the equitable remedy of reinstatement is the relief typically awarded for a § 510 violation, it makes eminent sense that the remedial provision with which it is partnered is § 502(a)(3).

Together, the two provisions provide more than adequate relief for plaintiffs who have been wrongfully terminated.

Petitioners, however, do not and cannot allege that they were victims of wrongful termination or retaliatory discharge. They were employees of AT&T Paradyne which was sold. At the time of the sale, all of the Petitioners had vested pension benefits and not a single penny of those benefits was lost. All of the Petitioners received pension benefits under the new Paradyne's defined contribution plan. The "bridging rights" in the Lucent Pension Plan were not "destroyed" or "eliminated" as Petitioners suggest, as evidenced by the fact that three of the Petitioners returned to employment with Lucent and bridged their period of service for service pension eligibility. Given these circumstances, Petitioners clearly are not the type of claimants contemplated by § 510. Therefore, the lower courts correctly held that Petitioners have no available remedy under § 502(a)(3). If an exception to that result is to be made, "it is for Congress to undertake that task," not this Court. *Millsap*, 368 F.3d at 1260 (citation omitted).

CONCLUSION

As set forth herein, the rulings by the District Court and the Third Circuit do not conflict with either a decision of this Court or a decision of any Court of Appeals. Nor do the lower court rulings implicate an important question of federal law that has not previously been addressed by this Court. Because Petitioners have not demonstrated any compelling reasons for granting their Petition, as required by Supreme Court Rule 10, Respondent Texas Pacific Group respectfully requests that the Petition be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT TEXAS PACIFIC GROUP

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STATEMENT PURSUANT TO RULE 29.6

Respondent Texas Pacific Group's corporate disclosure statement was set forth at page ii of their Brief in Opposition, and there are no amendments to that statement.

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INTRODUCTION

Respondent Texas Pacific Group ("TPG") submits this supplemental brief in accordance with Supreme Court Rule 15(8) in response to the brief of *Amici Curiae* AARP and the National Employment Lawyers Association ("NELA"). AARP and NELA are hereinafter collectively referred to as "*Amici*."

STATEMENT OF THE CASE

TPG respectfully refers the Court to the Statement of the Case set forth in its Brief in Opposition, which it incorporates and adopts herein.

ARGUMENT

I. Amici's Arguments Are Based Upon A Misapprehension Of The Facts Of This Case.

Amici's brief focuses on the purportedly narrow judicial interpretation of § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), following this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), and the alleged attendant limitations on the relief available to claimants under § 510 of ERISA, 29 U.S.C. § 1140. Whether subsequent judicial application of the holdings in *Mertens* and *Great-West* has resulted in an allegedly restrictive interpretation of the equitable relief available under § 502(a)(3) is a hypothetical issue and entirely irrelevant to the case at hand. Petitioners did not seek equitable relief below and have not suffered the type of wrong that § 510 was designed to prevent. Petitioners have sought only impermissible compensatory damages notwithstanding the fact that no Petitioner lost a single cent of vested pension benefits. This case simply is not the appropriate occasion to define the boundaries of

"appropriate equitable relief" in the context of § 510 cases. Therefore, the Petition should be denied.

A. *Amici*'s Arguments Regarding Reinstatement Are Irrelevant As Reinstatement Has Not Been Requested And Is Not Appropriate.

The fact that *Amici* are unfamiliar with the complex and unique facts of this case is readily apparent in their phrasing of their question presented for resolution, *i.e.*, "whether equitable relief under § 502(a)(3), 29 U.S.C. § 1132(a)(3), includes reinstatement to the plan to become eligible for benefits or the benefits lost due to the employer's illegal actions to interfere with their pension benefits." (*Amici*'s Brief at M-2.) Respondents have never argued, nor has either of the lower courts held, that reinstatement is not a potentially available equitable remedy under § 502(a)(3). Reinstatement, rather, is not an issue in this matter. Petitioners have never sought to be reinstated to their former positions with AT&T Paradyne, nor could they be as AT&T Paradyne has ceased to exist. Petitioners similarly have never sought relief requiring their employment with the Lucent Technologies Inc. ("Lucent"). Petitioners have attempted to characterize the relief that they are seeking as a kind of reinstatement to the Lucent Pension Plan. However, Petitioners have at all times remained vested beneficiaries of the Lucent Pension Plan and will begin receiving their vested pension benefits when they reach pension eligibility under the terms of the Lucent Pension Plan. Therefore, *Amici*'s legal arguments regarding "reinstatement" are irrelevant to the facts of this matter and offer no basis for granting the Petition.

B. *Amici*'s Arguments Regarding Back Pay Cite Superseded Authority.

In *Great-West*, this Court held that back pay is treated as equitable only when it is an integral part of an equitable

remedy, such as reinstatement. *Great-West*, 534 U.S. at 518, n. 4. Back pay, standing alone, constitutes a form of legal, not equitable, restitution and, therefore, is not recoverable under § 502(a)(3). *See* 534 U.S. at 518, n. 4. Nevertheless, *Amici* argue that "nearly every circuit to consider the issue after *Mertens* has held that back pay is an appropriate equitable remedy for a § 510 violation." (*Amici*'s Brief at p. 13.) However, every case cited by *Amici* in support of this argument was decided before this Court's decision in *Great-West*. Following this Court's decision in *Great-West*, courts have uniformly held that back pay by itself is not recoverable under § 502(a)(3). *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246 (10th Cir. 2004) (holding that a claim for back pay, without more, is "almost an exemplar of a claim at law" and therefore not recoverable under § 502(a)(3) as equitable relief); *Nicolau v. Horizon Media, Inc.*, 2003 WL 22208356 *2 (S.D.N.Y.), *on reconsid.*, 2003 WL 22852680 (S.D.N.Y.), *rev'd on other grounds*, 402 F.3d 325 (2d Cir. 2005) (rejecting a free-standing claim for back pay under § 502(a)(3)); *De Pace v. Matsushita Elec. Corp. of America*, 257 F.Supp.2d 543, 563 (E.D.N.Y. 2003) (holding that "the Supreme Court's subsequently overly narrow reading of 'equitable relief,' as that term is defined in § 1132(a)(3), appears to foreclose [a] 'make-whole' remedial scheme"); *Bona v. Barasch*, 2003 WL 1395932 *11 (S.D.N.Y.) (holding that free-standing awards of back pay cannot be reconciled with *Great-West*); *Kishter v. Principal Life Insurance Company*, 186 F.Supp.2d 438, 445 (S.D.N.Y. 2002) (holding that the Supreme Court in *Great-West* expressly rejected the arguments that could be used to justify an award of back pay). Thus, *Amici*'s contention that Petitioners are entitled to back pay is unsupported by the weight of authority, and provides no basis for granting the Petition.

C. *Amici*'s Argument That All Coercive Relief Is Equitable Is Incorrect.

In an effort to overcome the fact that Petitioners cannot identify a recognized form of equitable relief, *Amici* argue that all relief involving "coercive elements" is equitable. (*Amici*'s Brief at p. 14.) This is an oversimplification. An order coercing a party to perform or refrain from performing a particular act or acts is equitable. An order coercing a party to pay money is not equitable. *Great-West*, 534 U.S. at 210-11. Here, Petitioners have no need to "coerce" Respondents to act a certain way or to stop acting a certain way because Respondents are not engaging in any activity that presents the threat of future or ongoing harm to the Petitioners. Instead, Petitioners allege that they were harmed by the occurrence of a past event, *i.e.*, the imposition of the Post-Closing Net, and they are seeking compensation for that harm. That is not equitable relief; that is the very definition of compensatory damages.

Amici, nevertheless, contend that Petitioners are seeking coercive relief in the form of an order compelling Respondents "to take certain actions to enable them to become eligible for their bridging rights to determine whether they may obtain benefits under the plan." (*Amici*'s Brief at p. 15.) The specific "actions" are not articulated by *Amici*, which again reflects a lack of understanding of the facts in this case. As previously discussed, Petitioners have never sought an order compelling their employment with Lucent, AT&T or their affiliates. Therefore, reinstatement is not one of the actions that Petitioners seek to compel. The only way other than reinstatement for Petitioners "to become eligible for their bridging rights" would be for the Court to order Respondents to credit Petitioners with service that they never gave and benefits that they never earned. This would constitute a windfall to Petitioners and

would be an inequitable result, contrary to the express terms of § 502(a)(3).

Amici's misapprehension of the facts is further demonstrated by the argument that Petitioners require equitable relief "to enable them to become eligible for their bridging rights." At least three of the Petitioners were hired by Lucent and utilized the bridging provisions of the Lucent Pension Plan to bridge their service time. The remaining Petitioners were never hired by Lucent, AT&T or their affiliates and thus could not make use of the bridging provisions of the Lucent Pension Plan because they did not work for Lucent. Nevertheless, the fact that three of the Petitioners did successfully bridge their periods of service completely undermines *Amici*'s argument that Petitioners were unable to bridge their terms of service. Therefore, *Amici*'s argument does not present a compelling reason for granting the Petition.

D. *Amici* Admit That The Alleged Equitable Relief Sought By Petitioners Is Nothing More Than An Empty Shell When They State That Respondents Could Still Deny Benefits To Petitioners Even After This Supposed Equitable Relief Has Been Granted.

Amici effectively admit the fallacy of their purported equitable relief when they state that "[t]here are many factors that implicate a participant's eligibility for and amount of benefits, including salary and years of service" and that even if Petitioners were awarded the undefined equitable relief, Respondents still "may have adequate reasons to deny the benefit or calculate an amount different than that which the participant believes that he or she is entitled." (*Amici*'s Brief at p. 15.) If Respondents could deny Petitioners the benefits that they seek, then the alleged equitable relief to which *Amici*'s refer (and which

Petitioners did not seek below) is no relief at all; it is a ruse to get around § 502(a)(3)'s prohibition against compensatory damages. Because equity does not require the doing of a vain act, *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587, 597 (6th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005), this Court must see through *Amici*'s argument that some unspecified equitable relief is being demanded by Petitioners and look to the Petitioners repeated admissions below, which permit only one conclusion: Petitioners seek impermissible compensatory damages, which the lower courts properly held were not recoverable under § 502(a)(3).

E. The *Swaback* and *Epright* Cases Cited By *Amici* Do Not Support An Award Of Relief To Petitioners Because They Were Decided Under § 502(a)(1)(B).

Amici maintain that "other courts have ordered defendants to permit participants to meet the eligibility requirements for plan benefits where the defendants have prevented the participants from meeting such requirements . . ." (*Amici*'s Brief at p. 15.) In support of this contention, *Amici* cite *Swaback v. American Info. Techs. Corp.*, 103 F.3d 535 (7th Cir. 1996) and *Epright v. Envtl. Res. Mgmt., Inc. Health & Welfare Plan*, 81 F.3d 335 (3rd Cir. 1996). Neither of these cases involved claims for interference with attainment of benefits. Rather, plaintiffs in those cases were alleging a wrongful denial of benefits to which they claimed they were already entitled under the terms of the plan. Thus, they were not proceeding under § 502(a)(3), but instead under § 502(a)(1)(B). Section 502(a)(1)(B), which is not applicable to § 510, permits awards of both legal and equitable relief and thus does not require an analysis of whether the remedy sought is

appropriate equitable relief, as does § 502(a)(3). *Swaback* and *Epright*, therefore, are completely inapposite to the factual and legal issues presented here and do not present a compelling reason for granting the Petition.

F. The Modifier "Appropriate" Does Not Expand The Scope Of Equitable Relief Available Under § 502(a)(3).

Amici suggest that the use of the word "appropriate" to modify the term "equitable relief" provides a possible avenue to expand the available remedies under § 502(a)(3). In essence, *Amici* argue that Congress intended courts to use § 503(a)(3) flexibly to award relief that is "appropriate" to the nature of the claim being asserted. Under this theory, relief that is appropriate to remedy a § 510 claim might be different than the relief that is appropriate to remedy a breach of fiduciary duty claim. However, the fact that relief must be appropriate does not change the fact that it must also be equitable. The language of the statute does not provide that the remedy must be appropriate *or* equitable; rather, it must be appropriate *and* equitable. Thus, the word "appropriate" must be read not as expanding the scope of equitable relief but as limiting or qualifying it. Accordingly, under the terms of the statute, equitable relief can be awarded only where it is appropriate under the circumstances. This presupposes that there will be instances in which equitable relief may be inappropriate and, therefore, unavailable, which would be the case here, if Petitioners sought equitable relief below.

G. *Mertens* and *Great-West* Control The Analysis Of This Case.

In an effort to avoid their prohibition against compensatory damages, *Amici* argue that *Mertens* and *Great-West* do not control the analysis of this case because this Court was not called upon in those matters to consider appropriate equitable relief in the context of a § 510 claim. *Amici* appear to suggest that § 502(a)(3) should be interpreted differently in redressing § 510 violations than breaches of fiduciary duty (*Mertens*) or claims for reimbursement of benefits to the plan (*Great-West*). If Congress intended § 510 claims to be remedied differently than other provisions of ERISA or if it intended the definition of "appropriate equitable relief" to be more expansive for § 510 plaintiffs, it could have created a remedial provision especially for § 510, as it did for other causes of action. For example, § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), provides the remedy for a violation of § 502(c), 29 U.S.C. § 1132(c), and § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides the remedy for a violation of § 409, 29 U.S.C. § 1109. The fact that Congress did not draft a remedial provision exclusively for § 510 demonstrates Congress' intent that the term "appropriate equitable relief" be applied uniformly regardless of the nature of the underlying claim for relief.

H. Petitioners Have Not Suffered The Wrong That § 510 Was Designed To Prevent.

Amici argue that § 510 of ERISA is intended to protect employees who have been *wrongfully terminated* by their employers in order to prevent pension benefits from *vesting*. (*Amici*'s Brief at p. 5 (quoting *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143 (1990)). The most common remedy for a plaintiff who satisfies the elements of a claim under § 510 is an order compelling the employer to reinstate

the plaintiff so that he or she may attain eligibility for vested pension benefits. Petitioners, however, have not suffered the wrong that § 510 was designed to prevent. That is the reason why they have never been able to articulate a demand for reinstatement or any other form of equitable relief under § 510's corresponding enforcement provision, § 502(a)(3).

Petitioners were not wrongfully terminated. Petitioners' employment with AT&T Paradyne was terminated upon the sale of that business entity. Moreover, Petitioners did not lose any of their vested pension benefits. Petitioners held vested benefits in the Lucent Pension Plan at the time of the sale, and none of those benefits was lost as a result of the sale. Instead, Petitioners allege that they were deprived of enhanced pension benefits because they "lost the right" to bridge their period of service. Assuming, *arguendo*, that bridging was a "right" under the Lucent Pension Plan, a fact which Respondents do not concede, the contention that the Post-Closing Net "destroyed bridging rights" is completely disproven by the fact that three of the Petitioners were, in fact, employed by Lucent and bridged their terms of service for purposes of service pension eligibility. Because the Petitioners did not suffer the harm that § 510 was designed to prevent, this case does not offer the appropriate setting in which to address the scope of equitable relief available to § 510 plaintiffs.

I. The Wrongful Termination Provision Of § 510 Of ERISA Should Not Be Interpreted The Same Way As Wrongful Termination Provisions Under Employment Discrimination Statutes.

Amici argue that § 510, as the wrongful termination provision of ERISA, must be interpreted consistently with wrongful termination provisions in other statutes, such as Title VII of the Civil Rights Act of 1964 ("Title VII"),

42 U.S.C. § 2000e-2, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3), which do not limit relief to equitable remedies. (*Amici*'s Brief at pp. 9-13.) This argument ignores the fact that ERISA is not a make-whole statute, like Title VII and the NLRA. Title VII and the NLRA were intended to provide the employee with complete protection from discriminatory practices. *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246, 1259 (10th Cir. 2004). In passing Title VII and the NLRA, Congress had no competing interest with which to be concerned, nor did Congress have to worry that Title VII and the NLRA would have a chilling effect on employment. In passing ERISA, however, Congress tried to balance the competing interests of safeguarding employee benefits and containing pension costs. *Mertens*, 508 U.S. at 262-63. Congress did not want to so burden pension plans with concerns about litigation expenses that it discouraged employers from offering the plans in the first place. *Id.* Consequently, ERISA, which is primarily concerned with protecting the funds of the plan, does not offer relief to every individual plaintiff. *Mertens*, 508 U.S. at 262; *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985). Thus, it is understood and accepted that certain individual plaintiffs can be left without a remedy under § 510 of ERISA. Petitioners fall within that category. As TPG noted in its Brief in Opposition to the Petition, if ERISA is to be turned into a make-whole statute, "it is for Congress to undertake that task," not the courts. *Millsap*, 368 F.3d at 1260.

CONCLUSION

For the reasons set forth herein and in its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent Texas Pacific Group respectfully requests that the Petition be denied.

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No. 07-280

IN THE
SUPREME COURT OF THE UNITED STATES

KURT H. EICHORN, *et al.*,
Petitioners,

v.

AT&T, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

AARP and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the position of Petitioner, Kurt H. Eichorn, and those of the class he represents, whose case is before the Court on a writ of *certiorari* from the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Pursuant to Supreme Court Rule 37.3, consent of the parties to the filing of the brief was sought through counsel. Counsel for Petitioners gave consent, but counsel for Respondents withheld consent.

INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of over 39 million people age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older persons. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. Countless members participate in or receive employer-funded health, pension, disability, and other employee and retiree benefit plans. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports

precedent-setting litigation affecting the rights of individuals in the workplace. NELA members have particular expertise in the issues raised in this action because they have represented employees in a number of cases involving ERISA § 510.

AARP and NELA are qualified to brief the Court on this matter, as they have participated as *amicus curiae*, both singly and jointly, in numerous cases involving remedies under the Employee Retirement Income Security Act (ERISA). *See, e.g.,Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004).

AARP's members, NELA members' clients and other participants in employee benefit plans rely on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* In particular, they depend on ERISA's protections against an employer's intentional actions to deprive them of those benefits. Of particular concern for AARP and NELA is the ability of these participants to obtain meaningful recovery under ERISA's civil enforcement provisions. In this case, the discrete legal issue is whether equitable relief under § 502(a)(3), 29 U.S.C. §1132(a)(3), includes reinstatement to the plan to become eligible for benefits or the benefits lost due to the employer's illegal actions to interfere with their pension benefits. More broadly, the issue is whether relief under § 502(a)(3) includes a remedy other than a prospective injunction for an employer's intentional interference with retirement and welfare benefits.

Employees will have no meaningful remedy if they may be terminated to prevent them from obtaining benefits without the ability to obtain reinstatement into the plan or the lost benefits themselves, as here, or in other cases the inability to obtain front or back pay. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1254-61 (10th Cir. 2004) (holding that back pay is not appropriate equitable relief under § 502(a)(3)). ERISA will not act as the deterrent to employers from terminating plan participants to interfere with benefits that Congress intended. Indeed, ERISA's anti-retaliation and anti-

discrimination provision will become superfluous. *Cf. Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1874 (2006) ("that [position] would make § 502(a)(3)(B)(ii) an empty promise").

The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other participants of employee benefit plans.

REASONS FOR GRANTING THE MOTION

The motion of AARP and NELA should be granted because the brief focuses on only one of Petitioners' questions.[1/] The brief of AARP and NELA not only presents a different way of analyzing the issue than that presented by Petitioners but also a broader outlook at what the outstanding issue before the Court is. Indeed, the reasons for granting the writ of *certiorari* shows the impact on AARP members and NELA members' clients.

A writ of *certiorari* is appropriate because there is a substantial conflict within the Third Circuit's own decisions, *compare Eichorn v. AT&T*, 484 F.3d 644, *reh'g en banc denied*, 489 F.3d 590 (3d Cir. 2007) (holding that participants may not recover losses directly caused by employer's actions, even if these actions violated ERISA) *with Gavalik v. Continental Can Co.*, 812 F.2d 834, 856 (3d Cir. 1987) (§ 510 is designed to redress and prevent injury to employees' protected rights); within the Sixth Circuit's own decisions, *compare Alexander v. Bosch Auto. Sys., Inc.*, 232 Fed. Appx. 491, 497-98 (6th Cir. 2007) (holding that a remedy requiring employer to place plaintiffs' names on a list of persons eligible to receive plant-closure benefits, even though the employer violated § 510 to deprive plaintiffs of such benefits, was not appropriate equitable relief under § 502(a)(3)) *with Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (holding that an employee who was discharged for filing an ERISA claim against her employer may recover back pay and front pay as appropriate

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[1/] *Amici's* brief only addresses Petitioner's question concerning relief for a § 510 violation under § 502(a)(3).

equitable relief under § 502(a)(3)); and between the Third and Ninth Circuits on the question presented by the Petitioners. *Compare Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185-86 (9th Cir. 2004) (holding that requiring employer to modify its personnel records to change termination date, and therefore make plaintiffs eligible for special termination benefits, was appropriate equitable relief under § 502(a)(3)) *with Eichorn*, 484 F.3d 248 (rejecting the reasoning of *Mathews*).

More specifically, the *Eichorn* decision undermines ERISA's objective of protecting employees from employers who terminate their employees or take other actions to avoid paying benefits. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1254-61 (10th Cir. 2004) (holding that back pay is not appropriate equitable relief under § 502(a)(3) where an employer violates ERISA by closing a plant to prevent plaintiffs' pension plans from vesting, even though no other relief is available due to employer delay and spoliation of evidence).

Although the conduct alleged here is the conduct Congress intended to prevent when it enacted § 510, if *Eichorn* is left standing, employers can violate ERISA with impunity. *Id.* Indeed, this decision leaves ERISA as the only employment statute with no anti-retaliation protections. A writ of *certiorari* is appropriate because the Third Circuit's decision renders § 510's protections nugatory. It makes little sense for Congress to enact a statutory provision which allegedly protects against involuntary termination to interfere with the attainment of benefits if there is no ability to recover the lost benefits or related relief such as back pay.

Finally, the issue of the appropriate scope of equitable relief is currently before this Court, albeit in a different context. *See LaRue v. DeWolff, Boberg & Assoc., Inc.*, 450 F.3d 570 (4th Cir. 2006), *reh'g en banc denied*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (June 18, 2007) (No. 06-856) (holding that a participant may not recover monetary loss to his account caused by a plan fiduciary's failure to follow his explicit plan investment instruction as appropriate equitable relief under § 502(a)(3)); *see also Goeres v. Charles Schwab & Co., Inc.*, 220 Fed.Appx. 663, 2007 WL 495191 (9th Cir.

Feb. 14, 2007), *petition for cert. filed*, 75 U.S.L.W. 3637 (May 15, 2007) (No. 06-1521) (holding a plan beneficiary may not recover monetary loss to his account caused by the employer's refusal to turn over his funds even after numerous requests as equitable relief under § 502(a)(3)). This case would provide the Court with the opportunity to look at the issue of remedies under § 502(a)(3) more globally and respond to the rising chorus of judicial and scholarly concern.[2/] Thus, the issue presented by Petitioners affects both a substantial number of plans and their covered participants.

In light of the significance of the issues presented by this case and the impact on AARP members and other workers, AARP and NELA respectfully request that the Court grant this motion to file their brief *amici curiae*.

Respectfully submitted,

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[2/] *See, e.g., Aetna Health Inc., v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring); *Eichorn v. AT&T*, 489 F.3d 590 (Ambro, J., concurring); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring). See these decisions for representative scholarly articles discussing ERISA remedies.

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James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packer Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (Spring/Summer 2001) 5

STATEMENT OF INTEREST[1/]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

I. RELIEF UNDER § 510 OF ERISA INCLUDES MORE THAN MERELY INJUNCTIVE RELIEF.

A. *Mertens, Great-West* and *Sereboff* Do Not Control the Analysis in this Case Because Employment Discrimination and Anti-Retaliation Statutes Did Not Exist at Common Law or in the Days of the Divided Bench.

ERISA § 502(a)(3) permits participants to obtain "appropriate equitable relief" against any defendant, including an employer, to redress violations of § 510. 29 U.S.C. § 1132(a)(3); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.* , 530 U.S. 238, 246-47 (2000). In other contexts, the Court has limited "equitable relief" under § 502(a)(3) to "those categories of relief that were *typically* available in equity." *Mertens v. Hewett Assoc.*, 508 U.S. 248, 256 (1993) (emphasis in original); *accord Great-West Life & Annuity Ins. Co. v. Knudsen* , 534 U.S. 204, 210 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.* , 126 S. Ct. 1869, 1873 (2006). However, none of the Court's precedent concerning remedies under § 502(a)(3) – *Mertens*, *Great-West*, and *Sereboff* – considered appropriate equitable relief in the context of a § 510 case and none held what relief was available under that section. Although there is *dicta* in *Great-West*, 534 U.S. at 218 n.4, concerning the scope of relief in § 510 cases, the Court may have been merely "flagging the issue." *See Harris Trust & Sav. Bank*, 530 U.S. at 249 (*dicta* in *Mertens* of ability to

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[1/] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

bring individual claims under § 502(a)(3) was merely "flagging [of] issue"). Neither *Mertens*, *Great-West* nor *Sereboff* controls this case.[2]

The issue in *Mertens* was whether a non-fiduciary who knowingly participated in a fiduciary breach was liable to the plan under § 502(a)(3) for losses resulting from such breach. 508 U.S. at 251. The Court's analysis of that question focused on whether the phrase "appropriate equitable relief" in § 502(a)(3) encompassed compensatory or money damages. *Id.* at 255. The Court concluded that "appropriate equitable relief" under § 502(a)(3) does not include compensatory or money damages because that interpretation would render the term "equitable" superfluous. *Id.*

Great-West elaborated on the Court's position in *Mertens*, holding again that a general contractual claim against a non-fiduciary is a request for legal damages. 534 U.S. at 210. Because Great-West merely requested personal liability for the amount of the benefits provided to the plaintiffs, neither a constructive trust nor an equitable lien could be imposed on any specific property in the defendants' possession so that the requested relief did not meet the parameters of equitable restitution, and the suit was not cognizable under § 502(a)(3). *Id.* at 214, 221.

Similar to the facts in *Great-West*, *Sereboff* arose in the context of a claim for reimbursement of benefits to the plan on account of the participant's recovery from a third-party tortfeasor. 126 S. Ct. at 1872-73. In *Sereboff*, the plaintiff

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[2] Briefs file in *LaRue* and *Goeres v. Charles Schwab & Co., Inc* ., 220 Fed.Appx. 663, 2007 WL 495191 (9th Cir. Feb. 14, 2007), *petition for cert. filed*, 75 U.S.L.W. 3637 (May 15, 2007)(No. 06-1521), suggest that the Court should overrule *Mertens* and its progeny. *Amicus* Brief of NELA in Support of Petitioners in *LaRue v. DeWolff, Boberg & Assoc., Inc.*,450 F.3d 570 (4th Cir. 2006), *reh'g en banc denied*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (June 18, 2007) (No. 06-856); Brief of Petitioner in *Goeres*. Both "recognize that [the] prior attempt to construe the phrase ["equitable relief"] does not give [] much help here." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

sought specifically identifiable funds over which a constructive trust or equitable lien could be placed. *Id.* at 1871. Relying on case law from the days of the divided bench, the Court held that the basis for the relief sought was clearly characterized as equitable–an equitable lien by agreement. *Id.* at 1874-75.

In none of these cases did the Court resolve how to classify statutory claims, such as employment discrimination and anti-retaliation claims, or remedies, such as back pay, which were unknown at common law and did not exist in either courts of law or courts of equity. The back pay discussion in footnote 4 of *Great-West* supports this analysis. *Great-West,* 534 U.S. at 218 n.4. Significantly, the Court refrained from stating that the statutory claim of employment discrimination and its related remedies, such as back pay and payment of benefits, were not available in courts of equity . Instead, the Court noted that back pay was an equitable remedy when awarded under Title VII as "an integral part of an equitable remedy." *Id.* (internal citations and quotation marks omitted); *accord, Bowen v. Massachusetts.*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief – which may include an order providing for the reinstatement of an employee with backpay").

Moreover, none of the "standard current works such as Dobbs, Palmer, Corbin, and the Restatements" respond to the question of the equitable nature of back pay or back benefits because these standard works deal only with common law claims and remedies, not statutory claims and remedies. *Great-West*, 534 U.S. at 217. Only Dobbs attempts to characterize these claims and reaches no concrete conclusion . *Compare* 2 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5) at 226 (2d ed. 1993) ("Reinstatement in a job appears to be equitable because such relief is essentially injunctive. But back pay seems on the surface to be an ordinary damages claim . . . . On the basis of such observations, it would seem that a reinstatement claim standing alone would be tried to the judge without a jury while a back pay claim standing alone would be tried to a jury if one is demanded. . . . But in fact the cases do not yield up any such single conclusion") (hereafter "DOBBS") *with* 2 DOBBS

§ 6.10(1) at 193 ("back pay and reinstatement remedies are usually considered equitable").

Reinstatement of an employee was, and is, disfavored at common law because of the inevitable friction between an employer and employee where the work relationship has soured. 3 DOBBS § 12.21(4) at 489 ("courts will not specifically enforce a personal services contract in favor of either party. As to employment itself, the general rules leaves the employee to a claim for damages or restitution."); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (specific performance employment contracts disfavored). Clearly, reinstatement and back pay were not available remedies at common law. Accordingly, *Mertens, Great-West* and *Sereboff* do not control this case because statutory employment discrimination and remedies such as back pay and lost benefits were not in existence at common law. Instead, the Court should use a different paradigm to determine the meaning of "appropriate equitable relief" for § 510 claims.

B. Congress Specifically Enacted § 510 To Effectively Protect Employees from Improperly Motivated Termination and to Ensure They Could Obtain Meaningful Relief.

To safeguard the rights provided by ERISA, Congress enacted § 510, which is ERISA's anti-retaliation and anti-discrimination provision, and § 502(a)(3), which permits individuals to sue for § 510 violations and obtain equitable relief. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990). The Senate Report explains the reasons that Congress believed enactment of § 510 was necessary to complement ERISA's other protections:

> These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions or violent

> reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.

S. REP. NO. 93-127, at 36 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872.[3]

The Court and the circuit courts have taken Congress' intent to confer such protections to heart. Indeed, the Court has stated:

> By its terms section 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA, because, without it, employers would be able to circumvent the provision of promised benefits. S. REP. NO. 93-127, at 35-36 (1973); H.R. REP. NO. 93-533, at 17 (1973).

Ingersoll-Rand, 498 U.S. at 143. Quite simply, "the overarching goal of the statute was to protect rights conferred

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[3] Prior to ERISA's enactment, employers had an incentive to terminate employees before they became eligible for retirement because employees would forfeit their right to a pension if they were not employed at their time of retirement. *See generally* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packer Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 694 (Spring/Summer 2001)(recounting the historical basis for ERISA's passage).

by an employee benefit plan . . . ." *Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997); *accord, Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999).

The Court emphasized that "section 510 helps make these [employer's] promises [of benefits] credible." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997). However, without the full panoply of relief, including reinstatement into the plan, the lost benefits themselves, back pay, front pay or reinstatement into the job as a remedy for a violation of § 510, the Court's rationale in *Inter-Modal* is undermined because the law will provide no deterrent effect upon employers terminating participants for the purpose of interfering with their rights to benefits. Instead, the incentive for employers is to prolong litigation in order to delay reinstatement and avoid paying discharged employees, at least some of whom who will be deceased or past normal retirement age upon judgment. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004). Indeed, if even reinstatement to the plan or lost benefits is not a remedy for terminations found violative of § 510, the statute engenders a type of "absurd or glaringly unjust" result, rendering the protections of § 510 nugatory. *See Inter-Modal*, 520 U.S. at 516.

C. Because § 502(a)(3)'s Term "Relief" Is Qualified by the Terms "Appropriate" And "Equitable," "Equitable Relief" under § 502(a)(3) Is Discretionary – Regardless Whether the Relief Is Reinstatement, Front Pay, Back Pay or Payment of Lost Benefits – and Thus Can Be Read to Provide the Relief That Congress Intended to Be Available Under § 510.

If an alleged wrong cannot be remedied later, then the courts should be issuing preliminary injunctions against alleged § 510 violations. "Section 510, . . . unlike other anti-discrimination provisions, is designed to prevent injury to employees' protected rights, not simply to redress the injury after the goals of a discriminatory plan have been effectuated."

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987). *Amici* note however, that the issuance of temporary restraining orders and injunctions are rare in these cases. *E.g.*, *Pollack v. FreightCar America, Inc.*, No. 3:07-201, 2007 WL 2406946 (W.D. Pa. Aug. 21, 2007) (post-*Eichorn* order denying in part plaintiff's motion for temporary restraining order). Even though movants may be able to show irreparable harm,[4] courts are reluctant to issue injunctive relief due to the complexity of these cases:

> Because of the complexity of much ERISA litigation (not to mention the shortage of federal judges), it tends to move slowly. The very predicate of an interference claim is that the defendant is keeping the plaintiff from benefits to which he would otherwise be entitled. The longer that interference continues, the less likely it is that injunctive relief will provide a workable remedy. . . . The end result is that for plaintiffs like Eichorn the case is won or lost at the preliminary injunction stage, for only that remedy will prevent the case becoming moot while discovery proceeds.

Eichorn v. AT&T, 489 F.3d 335, 593 (3d Cir. 2007) (Ambro, J.,

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[4] Two of the factors which a court must consider when addressing a motion for preliminary injunction is whether the movant can demonstrate a reasonable probability of success on the merits, *Crissman v. Dover Downs Entm't., Inc.*, 239 F.3d 357, 364 (3d Cir. 2001), and irreparable harm that is "potentia' harm which cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co. v. C.F. Air Freight, Inc .*, 882 F.2d 797, 801 (3d Cir. 1989). *Cf. Shegog v. Board of Educ . of City of Chicago*, 194 F.3d 836, 839 (7th Cir. 1999) (plaintiffs not entitled to preliminary injunction where they "can receive complete relief in the final judgment").

concurring). Another reason is that employers have no reason to comply with court orders. Indeed, *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1308-10 (N.D. Okla. 2001), *rev'd in part*, 368 F.3d 1246 (10th Cir. 2004), in which the court found the employer had engaged in spoliation of evidence and other discovery abuses, reaped the reward for its actions–no reinstatement of employers and no payment of back pay. *Millsap* gives employers a roadmap for using delay and abuses to shield their illegal actions from consequence. This is exactly the opposite of what Congress intended when it enacted § 510.

Amici suggest that the language of the statute itself provides a method to effectuate Congress' intent and purpose. Section 502(a)(3) states that participants may obtain "appropriate equitable relief." The Court has not fully interpreted the meaning of "appropriate" in its cases. In *Varity*, the participants were seeking, among other things, reinstatement into the plan, and the Court discussed whether such relief was appropriate equitable relief under § 502(a)(3) and concluded that it was. *See Varity Corp. v. Howe* , 516 U.S. 489, 495 (1996). Significantly, in *Great-West*, the Court acknowledged that it was undisputed that reinstatement into the plan in the *Varity* case was equitable relief under § 502(a)(3). 534 U.S. at 221 n.5.

This Court has interpreted § 502(a)(3)'s reference to "equitable relief," as limited to traditional equitable relief and excluding any type of compensatory relief. *Mertens*, 508 U.S. at 256; *accord Sereboff*, 126 S. Ct. at 1873; *Great-West*, 534 U.S. at 210. In *Varity*, the Court interpreted the term "appropriate," which immediately precedes "equitable relief" as a modifier of the term "equitable relief"–there, a limitation on equitable relief, holding that even traditional equitable relief may not be appropriate where a plan participant has a viable claim under § 502(a)(1)(B). 516 U.S. at 515. The Court concluded that reinstatement into the plan is appropriate equitable relief under § 502(a)(3). *See Varity*, 516 U.S. at 495; *accord Great-West*, 534 U.S. at 221 n.5 (acknowledging reinstatement into the plan as appropriate equitable relief under § 502(a)(3)).

Here, *amici* urge the Court to interpret the word "appropriate" to keep § 510 from being toothless. Congress meant to prevent employers from interfering with plan benefits, not to make such interference a profit center. The addition of the word "appropriate" means that Congress expected that sometimes even limited traditional equitable relief would be too much relief, *Varity*, 516 U.S. at 495, and sometimes it would not be enough. The only other interpretation of the term "appropriate" is that Congress included it in the expectation that courts would otherwise believe Congress was authorizing "inappropriate" equitable relief. This makes no sense.

Like the participants in *Varity*, Petitioners here must rely on § 502(a)(3) or have no remedy at all. There is no "ERISA-related purpose that denial of a [meaningful] remedy would serve." *Varity*, 516 U.S. at 515.

D. Because § 510 Is Modeled after Other Labor and Employment Statutes, Equitable Relief Should Be Interpreted Consistently with These Statutes.

When interpreting the meaning of a statute, the courts should presume that Congress legislated against the backdrop of existing law. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979). "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (quoting *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59 (1911)). Because ERISA was modeled in part on both the National Labor Relations Act (NLRA) and Title VII, ERISA should be interpreted consistently with those statutes where they are analogous. And, although the legislative history of ERISA does not explicitly enumerate the specific remedies meant to be included within the scope of "appropriate equitable remedies," the legislative histories of the NLRA and Title VII are instructive.

During Congressional statements, the protections under

§ 510 were analogized to § 8(a)(3) of the National Labor Relations Act (NLRA). *See* 119 CONG. REC. 30374, *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, PUB. L. NO. 93-206 (Comm. Print 1976) at 1774-75 (statement of Sen. Hartke) ("[[t]he language of ERISA section 510] parallels section 8(a)(3) of the National Labor Relations Act"). Remedies for violations of § 8(a)(3) are generally reinstatement, back pay, and cease and desist orders. Charles J. Morris, THE DEVELOPING LABOR LAW, *Discrimination in Employment* 263 (2d ed. 1983). The purpose of such remedies is to restore employees to the position they would have been in but for the employer's violation of the law. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power [of the NLRB] to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where the consequences are of a kind to thwart the purposes of the Act."). Accordingly, in the typical discrimination case under the NLRA, the National Labor Relations Board will normally order reinstatement with back pay as an equitable remedy. *See* 2 Patrick Hardin, THE DEVELOPING LABOR LAW 1833, 1838 (3d ed. 1992); *see also In re Chase Nat'l Bank of N.Y.* , 65 N.L.R.B. 827, 829 (1946).

Similarly, in a colloquy discussing the protections of § 510, Senator Javits emphasized that § 510 "gives the employee the same rights" and "provid[es] a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example." 119 CONG. REC. 30044, *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, PUB. L. NO. 93-206 (Comm. Print 1976) at 1641-42 (statement of Sen. Javits). These similarities between ERISA and Title VII are also evident in the statutes' text; both prohibit "unlawful discharge" of employees. *Compare* 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan .

. . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan") *with* 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin"). Furthermore, Congress amended Title VII in 1972 to permit the courts to grant "any other equitable relief as the court deems appropriate" shortly before enacting ERISA. *See* 42 U.S.C. § 2000e-5(g).

Even looking beyond the immediate understanding of Congress during ERISA's enactment, back pay and reinstatement fit logically within historical conceptions of equitable relief because no jury trial is available for these types of claims. *See* 2 DOBBS § 6.10(1) at 163 (noting that "back pay and reinstatement remedies are usually considered equitable. For this reason there was no jury trial right under Title VII before 1991, and still may be no jury in some instances"); *see also Curtis v. Loether*, 415 U.S. 189, 197 (1974) (noting that the circuit courts have held that back pay under Title VII is an equitable remedy not requiring a jury trial). For the same reason,[5/] back pay and reinstatement are also considered equitable remedies under a range of remedial statutes in addition to Title VII and the NLRA, including the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, *see, e.g., Mitchell v. Robert De Mario Jewelry. Inc.*, 361 U.S. 288, 295-96 (1960); Section 1981, 42 U.S.C. § 1981, *see, e.g., Earlie v. Jacobs*, 745 F.2d 342, 344 (5th Cir. 1984); *Moore v. Sun Oil Co. of Pa.*, 636 F.2d 154, 156 (6th Cir. 1980) (plaintiff is not entitled to a jury trial on the equitable issue of back pay); and Section 1983, 42 U.S.C. § 1983, *see, e.g., Bertot v. Sch. Dist. No. 1, Albany Cty., Wyo.*, 613 F.2d 245, 250 (10th Cir. 1979).

With such overwhelming historical evidence that back pay and reinstatement should be considered equitable remedies, to hold otherwise under § 510 without a clear indication that

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[5/] The Civil Rights Act of 1991, 105 Stat. 1071, S. Res. 1745, 102d Cong. (1991) (enacted), now permit cases to be tried in front of jury with the authority to award compensatory and punitive damages. 42 U.S.C. § 1981(c).

ERISA was meant to be an exception to the general rule in this regard would be illogical and inconsistent with history and precedent. *See Mitchell*, 361 U.S. at 291.

Indeed, *Mertens* affirmed this interpretation of "appropriate equitable relief" in § 502(a)(3) by looking at Title VII. *Mertens*, 508 U.S. at 255 n.5. Furthermore, in *Great-West*, the Court reaffirmed that back pay is available under Title VII when it is "an integral part of an equitable remedy" or is "awarded together with equitable relief." *Great-West*, 534 U.S. at 218 n.4 (internal citations and quotation marks omitted). Although *Millsap* cited the *Great-West dicta* in footnote four as precluding an award of back pay under § 502(a)(3), it actually supports the opposite conclusion: by affirming that back pay is an equitable remedy when it is an "integral part of an equitable remedy." *Id.* Reinstatement is an equitable remedy, and thus back pay also is equitable when awarded as an integral part of reinstatement.

Furthermore, nearly every circuit court to consider the issue after *Mertens* has held that back pay is an appropriate equitable remedy for a § 510 violation. *See e.g.*, *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (awarding back pay as a remedy for a § 510 violation and noting that though "restitution generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case" and that a court may restore the plaintiff to the pre-discrimination status-quo "either by return of something which he formerly had or by the receipt of its equivalent in money"); *Gerbec v. United States*, 164 F.3d 1015, 1023 (6th Cir. 1999) (noting that "*Mertens* allows only equitable relief which would mean back-pay and not tort-type relief"); *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 336 (2d Cir. 1997) (holding that back pay, restitution and reinstatement are available remedies for a § 510 violation). *But see Millsap v. McDonnell Douglas Corp.*, 368 F.3d at 1260 (holding that back pay was not an appropriate equitable remedy for a § 510 violation). Even when the employee cannot be reinstated, back pay remains an equitable remedy because it is within the court's broad powers in equity to make an injured party whole. *See Marks v. Prattco, Inc.*, 607 F.2d 1153, 1155 (5th Cir. 1979)

(reinstatement not a precondition to court-ordered back pay).

In addition, the majority of circuit courts have also analogized § 510 to labor statutes for other purposes. For purposes of the statute of limitations, circuit courts have used the most analogous state statute of limitations, depending on the type of claim and rights at issue. Where a discharge claim is involved, the circuit courts have used state "wrongful termination" or "retaliatory discharge" labor statutes. *See generally* EMPLOYEE BENEFITS LAW, at 1174 (Steve Sacher *et al.* eds., 2d ed. 2000); EMPLOYEE BENEFITS LAW (2006 CUM. SUPP.), at 1022 (Jane Kheel Stanley *et al.* eds., Cum. Supp. 2006). In determining the proper burden shifting in § 510 cases for plaintiffs relying upon circumstantial evidence, the majority of circuit courts have adopted the burden shifting framework used in Title VII employment discrimination claims. *See generally* EMPLOYEE BENEFITS LAW, at 1168-72;EMPLOYEE BENEFITS LAW (2006 CUM. SUPP.) at 1022. Other courts have looked to the NLRA and employment discrimination statutes to determine whether the doctrine of constructive discharge states a cause of action under § 510. *E.g., Lojek v. Thomas*, 716 F.2d 675, 681 (9th Cir. 1983).

Given the clear purpose of the Act to protect participants from discriminatory discharge, the analogies drawn by Congress between the protections and remedies afforded participants by § 510 and other labor and employment statutes, and ERISA's statement of policy that it was to provide "appropriate remedies," Congress did not need to specifically spell out that back pay was included as a form of equitable relief. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 291-92 (providing for the restoration of lost wages in a Fair Labor Standards Act case). Indeed, absent a clear command by Congress that a statute providing equitable relief excludes certain forms of relief, a court should presume that it has the discretion to exercise the full scope of equitable powers. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("unless otherwise provided by statute," or "by a

necessary and inescapable inference". . . . "[t]he great principles of equity, securing complete justice should not yield).

E. Reinstatement Into a Job or a Plan is Equitable Relief Because Equitable Remedies Include Those Remedies Which Force a Defendant to Act or Cease from Acting in a Certain Manner.

Although *amici* have discussed all potential remedies for a § 510 violation, including back pay, the immediate issue raised by petitioners is whether reinstatement of plaintiff's bridging rights is within a court's equitable powers. Equity enables the court to devise and shape relief according to the unique circumstances of the case. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 109, at 140-41 (Spencer W. Symons ed., 5th ed. 1941) [hereinafter POMEROY]. Usually, equity grants a personal order to the defendant to stop interfering with the plaintiff's economic opportunities *See also* 1 DOBBS §§ 2.1(1), (2), at 56, 59. Such relief is enforced by an order of contempt. *Id.* This historical understanding of equity aligns itself directly with the Court's interpretation of Congress' intent when it enacted ERISA to protect the interests of participants.

The most common equitable remedies available are coercive remedies which force a defendant to act or cease from acting in specified ways. DOBBS § 2.1(2), at 59. This element of compulsion or coercion is a typical characteristic of equity. *Id.* § 2.1(2), at 62 ("Whether the equitable remedy is called restitution, interpleader or specific performance, then, at root it is commonly an injunction in some form."). Further, when courts and lawyers use the term "equitable," it is understood to mean "the plaintiff has sought an equitable remedy, usually one involving coercive elements." *Id.* § 2.1(3), at 65-66.

The Court has recognized that such coercive remedies in ERISA cases provide equitable relief. *See Varity*, 516 U.S. at 495 (reinstatement into plan is appropriate equitable relief under § 502(a)(3)); *accord*, *Great-West*, 534 U.S. at 221 n.5 (reinstatement into plan in *Varity* was equitable relief under

§ 502(a)(3)).

Moreover, other courts have ordered defendants to permit participants to meet the eligibility requirements for plan benefits where the defendants have prevented the participants from meeting such requirements, not unlike this case. The courts have made it clear that they will not permit defendants to profit from their misdeeds. Thus, in*Swaback v. Ameritech*, 103 F.3d 535, 542-43 (7th Cir. 1996), the court ordered the plan to pay a lump sum benefit, where a plaintiff ill with cancer was told that he could not receive a lump sum without returning to work, even though that was contrary to the plan terms. The court held that but for the employer's misrepresentations, the plaintiff would have taken the necessary steps to fill out the enrollment form for benefits. *Id.* at 543-44; *accord, Epright v. Envtl. Res. Mgmt. Inc. Health & Welfare Plan*, 81 F.3d 335, 341 & n.1 (3d Cir. 1996) (but for the employer's erroneous interpretation of the plan, plaintiff would have completed enrollment forms; employer should not be permitted to benefit from its own mistake).

Here, the nature of one of the requested remedies is coercive which is typical equitable relief. Petitioners are requesting the defendants to take certain actions to enable them to become eligible for their bridging rights to determine whether they may obtain benefits under the plan. D OBBS § 2.6(3), at 155. Each participant will still have to file a claim for benefits in order to obtain the benefits to which s/he is entitled. If the defendant denies the participant's benefits or calculates an amount which is less than the participant believes s/he is entitled to the participant will have to file a § 502(a)(1)(B) claim.[6/] *Cf. Rush-Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 380 (2002) (in order to obtain benefits after prevailing under a statutory external review process, participants must still file suit for benefits under § 502(a)(1)(B)).

[6/] There are many factors that implicate a participant's eligibility for and amount of benefits, including salary and years of service. Defendant may have adequate reasons to deny the benefit or calculate an amount different than that which the participant believes that he or she is entitled.

II. THE COURT SHOULD REQUEST THE VIEWS OF THE SOLICITOR GENERAL.

If the Court has reservations about granting the Petition, *amici* respectfully suggest that the Court should invite the Solicitor General to express the views of the United States. As noted in the Petition, in the Secretary of Labor's *amicus* brief in *Millsap*, 368 F.3d 1246, the Secretary argued that equitable relief as a remedy for violations of § 510 included back pay. Because the Secretary has primary authority to interpret and enforce the provisions of Title I of ERISA, 29 U.S.C. §§ 1132, 1135, *amici* believe that the Solicitor General should be called upon to resolve any uncertainty regarding the propriety of further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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